TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 310

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED MARCH 7, 1924

(30,173)

D-486.

Was it understood that by both parties that the $800 was full & accepted by her in satisfaction of the Claim? The cases cited do not sufficient = There was controversy about the matter = Payment of part is not [illegible]

(30,173)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 26, 1924

[fol. 1]

In the

COURT OF CLAIMS

No. B-180

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY

vs.

THE UNITED STATES

I. PETITION—Filed August 22, 1922

To the Honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner, The St. Louis, Brownsville & Mexico Railway Company, respectfully represents as follows:

I

Your petitioner, a corporation, owns and operates, and at the times hereinafter mentioned owned and operated, a line of railroad extending from Houston to Brownsville, in the State of Texas, being a part of the railroad system known as the Gulf Coast Lines, and [fol. 2] was engaged with its connecting lines in interstate commerce. Your petitioner is and was at all times hereinafter mentioned a common carrier for hire of freight and passengers.

II

At various times during the years 1916 and 1917, your petitioner carried for the United States Government, upon bills of lading issued by officers of the United States Army having authority for that purpose, certain so-called "military impedimenta," consisting in part of guns, ammunition, caissons, tents and tent poles, beds, grains and forage for animals, horses, wagons, stoves, kitchen outfits, and other miscellaneous equipment, all being the property of the United States.

For the said transportation service your petitioner from time to time submitted its bills which were based upon the lawful and duly published tariff rates of your petitioner and its connecting carriers. Your petitioner's compensation for the said transportation service, as claimed in your petitioner's bills above mentioned, has in each instance been reduced by reason of various unauthorized and illegal disallowances and deductions made by the accounting and disbursing officers of the United States Government and your petitioner has consequently been deprived of a large part of the compensation lawfully due it. As to a part of the said transportation the disallowances and deductions were based upon the application of rates of Class D, pub-

lished for the transportation of emigrants' outfits and household goods, to which the Comptroller of the Treasury had held the Government was entitled, when shipping "military impedimenta" of the character herein described. As to the remainder of the said [fol. 3] transportation, the said disallowances and deductions have been made by reason of the application of the provisions of certain baggage car tariffs, published by your petitioner and its connecting carriers, wherein the right of certain shippers to the free transportation of one carload of baggage or other specified property in connection with each twenty-five passenger fares is authorized and allowed, to which special tariff provisions the Comptroller of the Treasury had held the Government was entitled in connection with the transportation of "military impedimenta." The total sum of the disallowances above mentioned is $11,818.08. The items thereof, the reference to the bills of lading, dates, and other details, are more particularly set forth in a statement which is annexed hereto and made a part hereof marked Appendix A.

III

Your petitioner avers that the property shipped on the said freight bills of lading, as above stated, was not and could not lawfully have been carried in baggage cars and was in no sense baggage within the common and known meaning of that term, or as used in your petitioner's published tariffs or those of its connecting carriers, but that the said property consisted entirely of camp and troop equipment or "impedimenta," including among other things, wagons, guns, limbers, horses, kitchen outfits, ammunition, forage and similar property, and that the action of the accounting officers of the United States Government in disallowing your petitioner's bills rendered for such transportation service, based upon your petitioner's lawfully published tariffs, and in refusing payment to your petitioner, was and is illegal.

IV

[fol. 4] Your petitioner avers that the said disallowances and the application of the provisions of the said special baggage car tariffs were erroneous and improper by reason of the provisions of certain agreements between your petitioner and other railroad carriers of the United States, on the one side, and the United States Government on the other side, on the subject of fares and allowances for the transportation of military traffic, as follows:

Revised Western Military Arrangement, effective July 1, 1916, executed on behalf of the carriers, including your petitioner, by their duly authorized agents, and on behalf of the United States by the Quartermaster General of the Army:

Interterritorial Military Arrangement 1, dated December 28, 1916, effective January 1, 1917, executed on behalf of the respective parties thereto by the same representatives above mentioned.

[fol. 7]

EXHIBIT A TO PETITION

The St. Louis, Brownsville & Mexico Railway Company

Claim versus U. S. Government for Freight Transportation Charges on Government property for which settlements were made upon basis of Emig Government has entirely eliminated Freight Charges, claiming transportation charges should be free, referring to decisions of comptroller of the Treasu should be carried free for every twenty-five (25) men moving with the shipment—Decision Nos. 27,942, June 18, 1918, and 27,963, July 25, 1918.

St. L. B. & M. Ry. Co. claims Class "A" rate as per Freight Tariffs on file with Interstate Commerce Commission at Washington, D. C. (as referred the Government was unauthorized to demand one (1) carload of Freight Free for every twenty-five (25) men moving with the shipment same as allowed

See Court of Claims of the United States versus Missouri Pacific Railroad Case No. 34,581, June 13, 1921, and Atchison, Topekt & Santa Fe Railway 1, 1919, upholding the contention of the Railroads.

Bill No.	Govt. B-L	Date	Origin—Destination	Article	Weight	Rate	Amount rendered	Co b
G- 480-A	1	10-26-1916	Peekskill, N. Y., McAllen, Texas....	Camp Equipment, Wagons etc.	443,440	Various	$2,549.08	$2,5
1893-A	5	7-31-1916	Camp Hagman, S. D., San Benito, Texas	Ordnance, Ammunition, etc.	281,800	Various	4,155.56	4,1
2259-A	No Number	7-12-1916	Green Haven, N. Y., McAllen, Texas.	Military Impedimenta.....	314,000	Various	2,854.02	2,0
3055-A	10738	5-23-1917	San Antonio, Texas, Brownsville, Texas	Wagons, Horses, and Mules.	590,800	Various	3,068.84	3,0
3377-A	WQA-3	6- 5-1917	El Paso, Texas, Brownsville, Texas..	Company Property.....	13,935	Various	160.10	1
4001-A	609	11-19-1917	Brownsville, Texas, Corpus Christi, Texas	Live Stock, Automobiles...	380,951	Various	1,272.85	1,2
4732-A	37	5-26-1917	Kingsville, Texas, San Benito, Texas.	Equipment and Horses....	172,000	Various	531.80	5
Total amount due St. L. B. & M. Ry. Co.....								$13,8

Accounting Department
Houston—Texas
July 10, 1922.
G. L. M.

EXHIBIT A TO PETITION

St. Louis, Brownsville & Mexico Railway Company

ges on Government property for which settlements were made upon basis of Emigrant Outfit or Class "D" rates, or the portation charges should be free, referring to decisions of comptroller of the Treasury, that one (1) carload of freight e shipment—Decision Nos. 27,942, June 18, 1918, and 27,963, July 25, 1918.
ffs on file with Interstate Commerce Commission at Washington, D. C. (as referred to in statements attached), also that ght Free for every twenty-five (25) men moving with the shipment same as allowed on Theatrical Baggage.
Railroad Case No. 34,581, June 13, 1921, and Atchison, Topekt & Santa Fe Railway Case No. 33,681, decided December

	Article	Weight	Rate	Amount rendered	Correct basis	Settled by Govt.	Balance due St. L. B. & M. Ry. Co.
exas....	Camp Equipment, Wagons etc.	443,440	Various	$2,549.08	$2,549.08	$810.60	$1,738.48
Benito, ...	Ordnance, Ammunition, etc.	281,800	Various	4,155.56	4,143.29	Nil	4,143.29
n, Texas.	Military Impedimenta.....	314,000	Various	2,854.02	2,052.72	198.70	1,854.02
wnsville, ...	Wagons, Horses, and Mules.	590,800	Various	3,068.84	3,068.84	464.50	2,604.34
Texas..	Company Property.	13,935	Various	160.10	160.10	Nil	160.10
Christi, ...	Live Stock, Automobiles...	380,951	Various	1,272.85	1,272.85	521.80	751.05
o, Texas.	Equipment and Horses....	172,000	Various	531.80	566.80	Nil	566.80
.....					$13,813.68	$1,995.60	$11,818.08

Accounting Department
Houston—Texas
July 10, 1922.
G. L. M.

That your petitioner is informed and believes that the said agreements, and the terms and provisions thereof, have heretofore been found by this Court as matters of fact, in other causes which have been submitted to and decided by this Court.

V

Your petitioner further avers that the Class D rate on household goods and emigrant movables was not available to any one for the character of transportation furnished the United States as above stated; that there is no similarity between household goods and emigrant movables on the one hand, and miscellaneous troop and quar- [fol. 5] termaster property and ordnance stores on the other hand, nor do the United States occupy the position of an emigrant or one entitled to the said rates.

VI

That by reason of the aforesaid action on your petitioner's bills for transportation service duly furnished the United States, your petitioner has been erroneously and unlawfully deprived of the sum of $11,818.08, which is now justly due and owing your petitioner from the United States.

VII

Your petitioner avers that no action has been had on this claim by Congress or by any of the executive departments of Government other than as above stated; that there exists no debt, counterclaim or set-off by which the said claim may or should be reduced; that no part thereof has been paid; that the said claim has not been assigned in whole or in part; that your petitioner is a citizen of the United States and has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government.

Wherefore, the premises considered, your petitioner prays judgment against the United States in the sum of eleven thousand eight hundred eighteen dollars and eight cents ($11,818.08).

The St. Louis, Brownsville & Mexico Railway Company, by
J. S. Pyeatt, President.

[fol. 6] Jurat showing the foregoing was duly sworn to by J. S. Pyeatt omitted in printing.

(Here follows Exhibit A to petition, marked side folio page 7.)

[fol. 8] II. General Traverse—Filed Oct. 20, 1922

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Robert H. Lovett, Assistant Attorney General. Lisle A. Smith, Attorney.

III. Submission of Case

On December 12, 1923, this case was submitted on merits, on stipulation of parties without argument by Messrs. Britton & Gray, for plaintiff, and by Mr. Lisle A. Smith, for the defendant.

[fol. 9] IV. Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.—Entered Jan. 7, 1924

This case having been heard by the Court of Claims, the court, upon the evidence and the stipulation of the parties, the plaintiff by its attorneys and the United States by Robert H. Lovett, Assistant Attorney General, entering into the stipulation, makes the following

Findings of Fact

I

The plaintiff is a common carrier by railroad, whose tariffs of charges for the service of transportation are duly published and filed with the Interstate Commerce Commission in accordance with law.

II

At the time of the transportation hereinafter mentioned there were in force on the lines of the plaintiff and other railroad carriers with which it connected, being the carriers who furnished the transportation hereinafter mentioned, certain special baggage-car tariffs covering the territory through which the said troops and military impedimenta were moved, which stated in substance and effect the terms and conditions upon which associated travelers traveling on one ticket might become entitled to a baggage car free for the transportation of certain of their effects on the basis generally of one car free to each twenty-five passengers.

III

Prior to July 1, 1916, the plaintiff, with other railroad carriers of the United States, entered into a certain agreement with the

United States Government, entitled "Revised western military arrangment," which was in effect from July 1, 1916, to December 31, 1916. It provided generally that in connection with the transportation of officers and enlisted men and others connected with the United States Army, United States Navy, and United States Marine Corps, the Government would be allowed a reduction of five per [fol. 10] cent from commercial fares less lawful land-grant deductions. It contained among other provisions the following:

"One hundred and fifty (150) pounds of personal effects of officers and men properly checkable as baggage will be transported without charge for one person, but this does not include company, battalion, regimental or Government property. Personal baggage in excess of the weight stated, when provision for transportation of same is specifically made in U. S. Army, U. S. Navy, or U. S. Marine Corps transportation request, will be charged for at the excess baggage rates less lawful land-grant deductions."

"When company, battalion, regimental or Government property is moved on passenger trains, it shall be subject to adjustment for each movement."

Prior to January 1, 1917, the plaintiff, with other railroad carriers, entered into another and similar agreement with the United States Government, entitled "Interterritorial military arrangement 1," which was in effect from January 1, 1917, throughout the year 1917. It also provided generally that in connection with the transportation of officers and enlisted men and others connected with the United States Army, United States Navy, and United States Marine Corps, the Government would be allowed a reduction of five per cent from commercial fares less lawful land-grant deductions. It contained among other provisions the following:

"XV. Baggage

"(1) One hundred and fifty (150) pounds of personal effects, properly checkable as baggage, under the tariff of the initial carrier, will be transported without charge for each person. Personal baggage in excess of the free allowance stated when provision for the transportation of the excess baggage is specially made in United States Army, Navy, or Marine Corps transportation requests and is paid for by the United States Government, will be charged for at regular excess baggage rate, based upon the net individual fare. When provision is not made in the transportation request for the transportation of excess baggage, collection will be made from the traveler at the regular commercial rate for weight in excess of the free allowance stated. Excess baggage charges will not be subject to allowances applicable in connection with the fares for tickets under this arrangement. Baggage regulations in other respects than above will be in accordance with the tariff of the initial carrier checking the baggage in each case.

"(2) Company, battalion, regimental or Government property is not included in the above."

IV

At various times during 1916 and 1917, the plaintiff carried for the United States Government, upon bills of lading issued by officers of the United States Army having authority for that purpose, certain shipments of "military impedimenta,' as stated in Exhibit A to the plaintiff's petition, consisting in part of guns, ammunition, caissons, tents and tent poles, beds, grains and forage for animals, horses, wagons, stoves, kitchen outfits, and other miscellaneous equipment, all being the property of the United States.

[fol. 11]

V

For the said transportation service the plaintiff, as delivering carrier, submitted its bills based upon lawful freight tariff rates less proper land-grant reductions. On the said bills the accounting officers and disbursing officers of the Government made numerous disallowances and deductions. Some of these disallowances were based on the application by analogy of rates of class D, published for the transportation of emigrants' movables and household goods, to which the Comptroller of the Treasury had held the Government was entitled when shipping military impedimenta. The remainder of the disallowances were on the ground that under certain rulings of the Comptroller of the Treasury the Government was entitled to the carriage of one carload of military impedimenta free with each twenty-five passenger fares, on the authority of the special baggage car tariffs referred to in Paragraph II, supra.

VI

For the transportation furnished subsequently to August 22, 1916, the difference between the amount alleged to be due on the basis of regularly published freight rates less proper land-grant percentages, and the amount paid by the Government on the basis of the emigrants' movables rate of class D and the special baggage car tariffs referred to in Finding III, supra, is $5,820.77. This total is made up of the following items, as shown in Exhibit A to plaintiff's petition:

Bill No.	Bill of B/L	Amount claimed	Amount paid	Difference
G–480–A	Oct. 26, 1916	$2,549.08	$810.60	$1,738.48
3055–A	May 23, 1917	3,068.84	464.50	2,604.34
3377–A	June 5, 1917	160.10	.....	160.10
4001–A	Nov. 19, 1917	1,272.85	521.80	751.05
4732–A	May 26, 1917	566.80	.....	566.80
Total		7,617.67	1,796.90	5,820.77

Suit Aug 1922

VII

Of the items mentioned in Finding VI, bills No. 3377 and No. 4001, on which the differences shown above are $160.10 and $751.05, respectively, were paid by disbursing officers of the War Department as rendered and claimed. Subsequently, upon settlement of the disbursing officers' accounts by the Auditor for the War Department the disbursing officers' payments were disallowed to the extent of the amounts claimed herein upon these two items. The amounts so disallowed in the disbursing officers' accounts were deducted from bills due the United States Railroad Administration. A settlement was thereafter made between the Railroad Administration and the plaintiff. It is conceded in this case by plaintiff that it can not recover on these two items of claim, and it relinquishes its claim on account of them.

[fol. 12]

VIII

Bills No. 3055 and No. 4732 shown in Finding VI, on which the differences claimed are $2,604.34 and $566.80, respectively, were included in the a gregate sums claimed by plaintiff in its petition filed September 20, 1920, in case No. 34697. In that petition the amount claimed on account of bill No. 3055 was $1,257.50 and on account of bill No. 4732 was $525. The findings of fact in that case were based upon a stipulation of parties and judgment was rendered in favor of plaintiff in the sum of $22,624.78. This judgment was paid. One of the findings of fact (Finding VIII) in said case state that "the numbers and amounts referred to in the foregoing paragraphs constitute the component parts and sum total of the said $22,624.78 and are the only items in question in the case at bar." Bills No. 3055 and No. 4732 are not mentioned in the findings in that case. The report of the Treasury Department filed in said case and upon which the said stipulation of facts was based stated as to bills No. 3055 and No. 4732 that because no deduction had been made "from these bills on account of the cause of complaint set forth in petition nothing is due in recovery."

IX

Bill G-480, referred to in Finding VI, was a claim under bill of lading for $2,549.08, which was settled by the Auditor for the War Department May 10, 1920, and by that settlement was reduced in the sum of $1,692.96. The amount allowed by the auditor was accepted by the plaintiff without objection or protest. No appeal to the comptroller for revision of the auditor's settlement was taken by the plaintiff. The reduction was made by the auditor to adjust to basis of one car free for each unit of twenty-five fares.

Conclusion of Law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Campbell, Chief Justice, delivered the opinion of the court:

The plaintiff's petition sets forth seven different items of claim. Of these, two bills, 1893-A and 2259-A, are barred by the statute of limitations of six years, and they are abandoned on that account by the plaintiff. The plaintiff also relinquishes any claim on account of bills No. 3377 and No. 4001, these bills having been paid in full to the plaintiff by the disbursing officer. Afterwards, on settlement of this officer's account by the Auditor for the War Department his account was checked with the differences claimed in the petition on these bills. Subsequently the amounts were deducted from the United States [fol. 13] Railroad Administration accounts, but it does not appear that this deduction affected plaintiff. See Philadelphia & Reading Railroad Co. case No. 34749 and Louisville & Nashville Railroad Co. case No. A-33, decided November 5, 1923. This leaves three items of the claim for consideration. As to one of these, G-480, being a claim for $1,692.96 on account of a deduction in this sum from a bill submitted by plaintiff to the Auditor for the War Department, the plaintiff says that this settlement by the auditor and the consequent deduction was made May 10, 1920, "when the question of the right of the Government to the free baggage car tariffs was very much in controversy." The Government insists that the plaintiff accepted the auditor's allowance without protest against the deduction or otherwise making objection to it and without availing itself of the right to have the auditor's settlement revised by the Comptroller of the Treasury, and that it should not now be heard to complain of the deduction. The bill in question arose October 26, 1916. The auditor's settlement was made in May, 1920, and this suit was brought August 22, 1922.

The Dockery Act, 28 Stat. 206, formulates the Government's accounting system. Among other things it provides in section 8 that balances which may from time to time be certified by the auditors "shall be final and conclusive upon the executive branch of the Government." Provision is made for a revision by the Comptroller of the Treasury of an auditor's settlement upon the application of "any person whose accounts may have been settled" within a year thereafter. No revision was had or applied for by the plaintiff. The act further provides that any person accepting payment under a set-

tlement by an auditor "shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted." The clearly defined policy of the act is to secure finality and conclusiveness in settlements of the designated officers. It will not allow a creditor to accept the auditor's allowance and apply to the comptroller for further payment.

The auditor's action is final and conclusive upon the executive branch. The policy of the statute should not be ignored and should have some consideration when a party whose accounts have been settled by the proper auditor appeals to the court for an additional amount to that received upon the auditor's certificate. The plaintiff's argument that when the deduction was made from its bill by the auditor the question of the right to make it "was very much in controversy" does not show sufficient reason for accepting the auditor's conclusion without any attempt to secure its revision by the comptroller or for its failure to signify any timely objection to this conclusion. As to these controverted items the plaintiff's account may be treated as unliquidated and its acceptance of the undisputed items a settlement of the entire claim. See Chicago, Milwaukee & St. Paul Railway Co. v. Clark, 178 U. S., 353, 367; Savage case, 92 U. S. 382, 388; Pacific Railroad Company case, 158 U. S. 118, 122.

This court in the case of Texas & Pacific Railway Company, 57 C. Cls. 284, 293, commented on the effect of the receipt of an allowance by an auditor and failure to protest against the disallowance of part of it, saying "there must be a time when public accounts are to be deemed settled; a time, without reference to statutes of limitation, when it may be assumed that settlements made are final, and it [fol. 14] must be as early as circumstances will permit. That ordinarily will occur when, after an auditor's settlement, the allowance made is paid and payment accepted without any action or circumstances repudiating the idea of an acceptance of the settlement as final." The question was again presented in Atchison, Topeka & Sante Fe Railway Company case, No. B-90, decided November 5, 1923, and it was concluded that acceptance of payment under the auditor's allowance of part of the asserted claim without protest or some other action clearly indicating nonacquiescence in such settlement would bar further prosecution of the claim. While these and other cases recognize the right of parties to apply to the courts in proper cases, it is not unreasonable to require them to make known to the auditor or comptroller, in some appropriate way, the purpose, if there be any, to further prosecute their demands, notwithstanding the action of these officials. In such case the latter acting for the Government could either withhold any voucher or authorize payment of the part allowed and have some notice of the proposed further prosecution of the claim. As already stated, there must be an end of accounting. Texas & Pacific Railway Company case, 57 C. Cls. 284, 293. The failure to indicate that the acceptance of the auditor's allowance was under protest and with a purpose to proceed further bars recovery in this suit. The claim was settled.

The two remaining items are bills No. 3055 and No. 4732, for differences claimed in the sums of $2,604.34 and $566.80, respectively.

The service upon which they are based was rendered in May, 1917. These items were included in a former petition by the same plaintiff, No. 34697, filed September 13, 1920. In that suit judgment was rendered in favor of plaintiff February 27, 1922, in a large amount, which has been paid. But plaintiff contends that the items now in question were not included in the judgment. The cases relied on to sustain this contention, Spicer case, 5 C. Cls. 34, and Book case, 31 C. Cls. 272, are not applicable. These items were "involved in the controversy." They were stated in the petition. The question is set at rest by section 178, Judicial Code. See Vaughn case, 34 C. Cls. 342; Frerich's case, 124 U. S. 315, 320.

The petition should be dismissed. And it is so ordered.

Graham, Judge; Hay, Judge; Downey, Judge; and Booth, Judge, concur.

[fol. 15] V. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Seventh day of January, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and against the United States; and that the petition herein be and the same is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Eight dollars and twenty-four cents ($8.24), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VI. PLAINTIFF'S APPLICATION FOR APPEAL—Filed February 5, 1924

Comes now the plaintiff, by its attorneys of record, and moves the allowance of an appeal to the Supreme Court. Findings of fact were filed and judgment in favor of the United States entered on January 7, 1924.

Britton & Gray, Attorneys for Plaintiff.

VII. ORDER OF COURT ALLOWING PLAINTIFF'S APPLICATION FOR APPEAL—Entered Feb. 11, 1924

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

[fol. 16] IN COURT OF CLAIMS OF THE UNITED STATES

[Title omitted]

CLERK'S CERTIFICATE

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the submission of case on stipulation of parties; of the findings of fact, conclusion of law and opinion of the court by Campbell, Ch. J.; of the judgment of the court; of the plaintiff's application for an appeal; of the order of court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this Fourteenth day of February, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of the Court of Claims.)

Endorsed on cover: File No. 30,173. Court of Claims. Term No. 310. The St. Louis, Brownsville & Mexico Railway Company, appellant, vs. The United States. Filed March 7th, 1924. File No. 30,173.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 310.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, *Appellant*,

vs.

THE UNITED STATES, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

ALEX. BRITTON,
L. H. CAKE,
Counsel for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SPECIFICATION OF ERRORS.

1. The Court of Claims erred in deciding as a conclusion of law that upon the findings of fact the plaintiff is not entitled to recover, and in dismissing the petition..... 5
2. The Court erred in deciding that as to bills 3055 and 4732 there could be no recovery because the items in question had been included in the petition in a former case, although not in the agreed statement of facts on which the case was submitted and not included in the judgment rendered 5
3. The Court erred in deciding that as to bill G-480 there could be no recovery because of the plaintiff's "failure to indicate that the acceptance of the Auditor's allowance was under protest and with a purpose to proceed further." 6

ARGUMENT

I. As to bills 3055 and 4732, the fact that they were included in the petition in another case, but not in the agreed statement of facts on which the case was submitted and not in the judgment rendered, does not constitute a bar to another suit to recover the amounts properly due thereon..... 6

II. As to bill G-480, the failure to indicate that the acceptance of the Auditor's allowance of an amount less than claimed was under protest and with a purpose to proceed further, does not bar a suit in the Court of Claims within the time allowed by the statute of limitations, because: 10

(1) Such a rule is contrary to the decisions of this court and the Court of Claims.... 11

(2) Such a rule has the effect of cutting down the jurisdiction of the Court of Claims, contrary to the statute conferring jurisdiction 18

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 310.

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY,

vs.

THE UNITED STATES.

STATEMENT OF THE CASE.

This case comes before this Court on appeal from a final judgment of the Court of Claims dismissing a petition filed by appellant seeking to recover $11,818.08 for certain freight transportation furnished the United States. (Record p. 10.)

It appears from the petition and findings of fact that the transportation was furnished on seven bills of lading in July and October, 1916, and May, June and November, 1917. Before the case was submitted four of the items were abandoned, so that as the case was submitted to the Court of Claims the claim was confined to three items, set out in finding VI (record p. 6) as follows:

Bill No.	Bill of Lading	Amount Claimed	Amount Paid	Difference
G-480-A	Oct. 26, 1916	$2,549.08	$810.60	$1,738.48
3055-A	May 23, 1917	3,068.84	464.50	2,604.34
4732-A	May 26, 1917	566.80		566.80
				$4,909.62

The amounts claimed were computed on the basis of regularly published freight rates less proper land-grant deductions, and the carrier's bills were so rendered. The Government accounting officers, however, made disallowances and reduced the payments accordingly. Some of the disallowances were based on the application by analogy of rates of Class D published for the transportation of emigrants' movables and household goods, to which the Comptroller of the Treasury had held the Government was entitled when shipping military impedimenta. The remainder of the disallowances were on the ground that under certain rulings of the Comptroller of the Treasury the Government was entitled to the carriage of one carload of military impedimenta free with each twenty-five passenger fares, on the authority of the special baggage car tariffs referred to in paragraph II of the findings of fact. See paragraph V of the findings (record, p. 6).

The disallowances were improper and should not have been made, as the Court of Claims has held in numerous decisions. The right of the Government to the emigrants' movables rate was denied in the case of *The A. T. & S. F. Ry. Co.*, No. 33681, decided December 1, 1919, 55 Ct. Cls. 525 (no opinion). The right of the Government to the free carriage of one carload of military impedimenta with every twenty-

five passenger fares was denied in *Missouri Pacific Railroad Co. vs. United States*, decided June 13, 1921, 56 Ct. Cls. 340. Both cases cited are leading cases and have been followed in every similar case since submitted to the Court of Claims.

It follows, therefore, that on the merits the plaintiff's claim to be paid the balance due it, *i. e.*, the difference between what it claimed and should have been paid on the basis of lawful freight rates less land-grant deductions, and what it actually was paid on the basis of the inapplicable emigrants' movables rate and the free baggage car provisions of the tariffs improperly applied by the Government accounting officers, was good. As to all the items in question, however, the claim was denied by the Court of Claims, not on the merits but on other grounds, as follows:

BILLS 3055 AND 4732.

The balances claimed on these bills are $2,604.34 and $566.80, respectively. These two items were included in the statement of claim incorporated in a petition filed by the plaintiff in another and earlier case, filed September 20, 1920, Court of Claims No. 34697. (The amounts claimed in the former case were not exactly the same as here, but the items were the same, that is, the claim was on account of the same service on Government bills of lading identified by carrier's bills 3055 and 4732). The report of the Treasury Department in that case stated that no deduction had been made from bills 3055 and 4732 "on account of the cause of complaint set forth in the petition." That case was submitted on an agreed statement of facts based on the report of the Treasury Department which was adopted by the Court as

its findings of fact, on which it rendered judgment for $22,624.78. One of the findings recited that "the numbers and amounts referred to in the foregoing paragraphs constitute the component parts and sum total of the said $22,624.78 and are the only items in question in the case at bar." Bills 3055 and 4732 were not mentioned in the agreed statement of facts nor in the findings in that case. (Finding VIII, record page 7).

The fact is, the two bills in question, 3055 and 4732, had been erroneously included with the others incorporated in the statement of claim accompanying the petition in case No. 34697. The Treasury Department reported the fact that no deduction had been made "from these bills on account of the cause of complaint set forth in the petition." They were eliminated from consideration and were not included in the agreed statement of facts on which that case was submitted, and of course, were not included in the judgment rendered. In effect, the plaintiff took a non-suit on those two items.

They were then included in the petition filed in the present case, August 22, 1922, the plaintiff setting up the correct charges due on the basis of freight rates less land-grant deductions, the amounts already paid by the Government on the basis of the erroneous application of the free baggage car provisions of the tariffs, and its claim for the differences still due and unpaid.

The Court of Claims held that there could be no recovery because the items in question had been included in the petition in a former case in which judgment had been rendered, that they were "involved in the controversy," and no further claim could be made, citing section 178 of the Judicial Code. Opinion of the Court of Claims, record pages 9-10.

BILL G-480.

On this bill the plaintiff claimed $1,738.48, being the difference between the correct charges on the basis of freight rates less land-grant deductions and the amounts paid by the Government on the basis of the erroneous application of the free baggage car provisions of the tariffs. For the service in question, on bill of lading dated October 26, 1916, the plaintiff had presented a bill for $2,549.08, which was settled by the Auditor for the War Department, May 10, 1920, allowing $856.12 and disallowing $1,692.96. The Government check for the amount allowed was cashed. So far as this settlement is concerned it does not appear that the plaintiff at the time made any protest or objection to the settlement nor appealed to the Comptroller of the Treasury, as it might have done. But suit was filed August 22, 1922, within six years from the date of the bill of lading. (Finding IX, record page 7).

The Court of Claims held that "the failure to indicate that the acceptance of the Auditor's allowance was under protest and with a purpose to proceed further bars recovery in this suit." Opinion, page 9.

SPECIFICATION OF ERRORS.

1. The Court of Claims erred in deciding as a conclusion of law that upon the findings of fact the plaintiff is not entitled to recover, and in dismissing the petition.

2. The Court erred in deciding that as to bills 3055 and 4732 there could be no recovery because the items in question had been included in the petition in a former case, although not in the agreed statement of

facts on which the case was submitted and not included in the judgment rendered.

3. The Court erred in deciding that as to Bill G-480 there could be no recovery because of the plaintiff's "failure to indicate that the acceptance of the Auditor's allowance was under protest and with a purpose to proceed further."

THE ARGUMENT.

BILLS 3055 AND 4732.

The fact that they were included in the petition in another case, but not in the agreed statement of facts on which the case was submitted and not included in the judgment rendered, does not constitute a bar to another suit to recover the amounts properly due thereon.

Sections 178 and 179 of the Judicial Code are as follows:

> "Sec. 178. The payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law, as provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy.
>
> Sec. 179. Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy."

They do not apply to this case because these items never proceeded to final judgment. They were admittedly not included in the agreed statement of facts on which the former case was submitted, and on which

the court made its findings of fact, and were not included in the judgment. That case embraced a great many items. Each item was a "claim" in itself. The fact that part of the claims proceeded to final judgment and were paid does not constitute a bar, as a final judgment, to other claims which were withdrawn and were not submitted for judgment.

We reply on *Spicer vs. United States* (1869), 5 Ct. Cls. 34, and *Book* vs. *United States* (1896), 31 Ct. Cls. 272.

In the *Spicer* case the plaintiff had sued for breach of contract in refusing to inspect and receive certain horses. On demurrer, his petition was dismissed because it failed to allege that he owned and tendered the horses. He filed a new suit making the suggested allegations as to ownership and tender. The Government pleaded the judgment in the former suit, and relied, not only on the general principles of estoppel and *res judicata,* but specifically on a provision contained in sec. 7 of the act of March 3, 1863 (12 Stats. 765)—"that any final judgment rendered against the claimant on any claim prosecuted as aforesaid shall forever bar any further claim or demand aginst the United States arising out of the matters involved in the controversy." The Court of Claims held that the act did not change the rule of the common law and was not intended to do more than attach to final judgments of the Court of Claims the conclusiveness which the common law ascribes to the final judgments of all courts of competent jurisdiction; that the former judgment to be a bar must be on the merits; and that in the particular case the second petition, by reason of new averments, being not objectionable to the de-

murrer in the first case the issue was changed and the first judgment was not *res judicata.*

In the *Book* case, the plaintiff's suit remained pending for a long time awaiting the decision of a test case in the Supreme Court and finally on motion of the Attorney General was dismissed for non-prosecution. The plaintiff's attorney did not have notice of the motion and the Attorney General did not then know that the case was awaiting the decision in a test case. After the end of the term the dismissal was discovered by the plaintiff's attorney and he moved to reinstate the case. The Government then set up the judgment of dismissal as one which made the case *res judicata.* The Court held that the dismissal was not a bar, following the *Spicer* case. Quoting from the opinion:

> "The leading case in this court on questions of *res judicata* is that of *Spicer* (5 Ct. Cls. R., 34). It is authoritative upon the question presented, and holds that in this court, as in all others, a judgment does not bar a second suit unless the decision was upon the merits. Judgments of non-pros and non-suit never constitute an estoppel. The plaintiff pays costs and brings a second action. The one simply establishes the fact that he did not prosecute his suit, and the other that his proof was not sufficient to maintain it. The only penalty incurred in such cases is that he must pay costs incurred before vexing the defendant by a second suit."

The general rule is stated in 15 Ruling Case Law 949, sec. 429 *et seq.*

In its opinion in the present case the Court refers to *Vaughn* vs. *United States,* 34 Ct. Cls. 342, and *United States* vs. *Frerichs,* 124 U. S. 315, 320. In the

Vaughn case the plaintiff, a letter carrier, recovered a judgment for $211.57. Later at the same term he moved for a further allowance supporting his motion with a stipulation on the part of the Government that his acceptance of the amount of the judgment should be without prejudice to his moving for a further allowance. Before his motion was presented to the court the judgment was satisfied and paid. The court held that the payment was a full discharge and that sec. 1092 of the Revised Statutes (now sec. 178 of the Judicial Code, quoted above) was a bar to any further motion or proceeding. In the Frerichs case, the plaintiff obtained a judgment against the United States but there was some question as to whether payment of the judgment would be a full discharge of the obligation of the United States. This court held that it would be, citing sec. 1092 of the Revised Statutes.

Neither the Vaughn case nor the Frerichs case satisfactorily answers the question here. In the Vaughn case there was a judgment on the merits which was paid and it was sought to reopen the case for the purpose of getting an additional judgment *on the same claim*. In the Frerichs case it was simply stated that the payment of the judgment would be a full discharge of *the claim for which judgment was rendered*.

In the present case we have two claims, out of the large number of claims included in the original suit, which were eliminated from consideration, were not included in the agreed statement of facts adopted by the court as its findings of fact, and were not included in the judgment rendered. The judgment rendered was a final judgment and a full discharge *of the claims included therein*. These two bills now before the court were not included in that judgment.

That there may be a non-suit in proceedings before the Court of Claims cannot be doubted, although it is true that it serves no useful purpose and is rarely taken. In *Crowell vs. United States* (1870), 6 Ct. Cls. 23, the court refused to dismiss a suit for a defect in proof and remanded it for further proof, holding that although a non-suit would be the proper procedure the Government was not interested in obtaining a non-suit because there would be no costs recovered and such a judgment would not be a bar to a second suit. In *Book vs. United States* (1896), 31 Ct. Cls. 272, the court referred to the *Spicer* case and the rule that a judgment does not bar a second suit unless the decision is on the merits, and stated that judgments of non-pros and non-suit are not such judgments and never constitute an estoppel or a bar to a second suit.

BILL G-480.

As to this bill the argument is that appellant's failure to indicate that the acceptance of the Auditor's allowance for an amount less than claimed was under protest and with a purpose to proceed further, does not constitute a bar to a suit in the Court of Claims within the time allowed by the statute of limitations.

To make the issue clear we again state the facts. The plaintiff performed transportation service for the Government in October 1916. It presented its bill for $2,549.08. The Auditor for the War Department made a settlement on *May 10, 1920,* allowing payment to the plaintiff of $856.12 and disallowing $1,692.96. The plaintiff filed its suit to recover the balance claimed to be due, $1,738.48, on August 22, 1922, a little more than two years after the Auditor's settle-

ment and within six years from the time the service was rendered.

The Court of Claims held that "the failure to indicate that the acceptance of the Auditor's allowance was under protest and with a purpose to proceed further bars recovery in this suit."

We argue that the rule applied by the Court of Claims is incorrect and not in accordance with law (1) because it is contrary to the decisions of this court and the Court of Claims, and (2) because it has the effect of cutting down the jurisdiction of the Court of Claims, contrary to the statute conferring jurisdiction, by imposing a new statute of limitations less than the six years prescribed by section 156 of the Judicial Code.

1. It is contrary to the decisions of this court and the Court of Claims.

In *Finney vs. United States,* 32 Ct. Cls. 546, it was contended for the Government that the claimant's acceptance of the amount claimed less deductions made by the Government officers had the effect to estop him from asserting a claim for the amount deducted, to which the Court said:

> "But there is no language in the Act indicating that it was the intention of Congress to thereby deprive a claimant of his right to sue in this court, and unless the acceptance by the claimant of a less sum than that claimed was by way of accord and satisfaction, as the defendants contend, his right to sue in this court is open under the Act of March 3, 1887."

It is said that an accord and satisfaction is a method of discharging a contract or settling a cause of action

by substituting for such contract or cause of action an *agreement* for the satisfaction thereof, and the execution of such substituted agreement. 1 Ruling Case Law 177. It is a contract in itself and therefore necessarily it involves an agreement between the parties and a definite intention on the part of both to make the settlement final. If the creditor is to be held to abate his claim against the debtor it must be shown that he understood or should have understood what he was doing when he received the consideration claimed therefor. 1 Ruling Case Law 183.

To establish an accord and satisfaction in this case the Government must show that the parties *agreed* and that it was their *intention* to make the settlement by the Auditor a final settlement. And the same is true if it is sought to establish an abandonment of the claim by the plaintiff. "To create an abandonment there must not only be an omission to prosecute but an intent to forego." *New York Indians vs. United States,* 170 U. S., 1, 35.

When such questions arise, the burden is on the party pleading the accord and satisfaction, or the abandonment, of proving the intention. The fact that the party against whom the defense is raised has filed his suit within the period allowed by the statute of limitations is *prima facie* evidence that he has not abandoned his claim and the burden is on the other side to show that the intention was otherwise.

The findings of fact in this case do not show an accord and satisfaction or an abandonment of the claim by the plaintiff. The lapse of time alone is not sufficient because the plaintiff had an absolute right under the statute to the full time allowed for filing its claim. The exercise of a statutory right in the man-

ner prescribed by the statute cannot be taken as evidence of the abandonment of the right. *United States vs. American Bell Telephone Co.*, 167 U. S., 224, 246-247.

In *Oregon-Washington Railroad & Navigation Co. vs. United States*, 54 Ct. Cls., 131, affirmed by this court in 255 U. S., 339, it was held that where a carrier voluntarily stated its bills over a long period of years on the basis claimed by the Government to be correct, in accordance with rulings of the Comptroller of the Treasury, it could not thereafter recover the difference between the amounts billed and paid and the correct amounts due, and must be held to have acquiesced in the settlements and to have abandoned its claim for the full amounts due. But the court took pains to distinguish such a case from other cases in which the claimants asserted their full claims by presenting them to the Auditor for the War Department and also to point out that

> "Action by neither nor both of these classes of officers [the disbursing officers and the accounting officers of the Government] must be permitted to obscure the independent right of access to this court." 54 Ct. Cls., 138.

Referring to the carrier's action in voluntarily presenting its accounts to the disbursing officers on the basis claimed by the Government officers to be correct, the court said:

> "We have shown, we think, that they were in fact so stated because that was all that was claimed, and there was no intention to claim more, but if in fact the plaintiff believed more was due, and intended to claim more, it could easily do so by presenting its claim to the auditor, instead of

the disbursing officer, and in so presenting it it could claim commercial rates or whatever it saw fit to claim.

As to this procedure it is argued that it would have been fruitless because the auditor would have made the settlement at land-grant rates, disallowing the excess, and it was understood to be useless to appeal to the comptroller. True enough; and so far as payment was concerned the result would have been the same. But plaintiff, thus securing for itself the same actual payment, *would have been in the attitude of asserting, through the proper channels, its claim to compensation at a different rate; it need not have appealed to the comptroller if it regarded it as a vain thing, and the doors of this court were always open to it to test its right to recover what it had claimed and been refused* and to establish by precedent its rights as to future transactions. It would then have been in the attitude of suing *for something it had claimed and which had been refused it by the auditor,* and not of claiming something more on account of closed transactions as to which its course for many years had conformed to established practice and as to which it had been paid all it claimed." 54 Ct. Cls. (Our italics.)

This case is clearly not within the rule of the *Oregon-Washington Railroad & Navigation Co.* case, but is within the exceptions expressly stated by the court in its opinion in that case.

In this case the plaintiff's claim was stated in full to the Auditor for the War Department and it was in the attitude of asserting through the proper channels its full claim to compensation. It need not have appealed to the Comptroller if it regarded it as a vain thing (which it did), and the doors of the Court of

Claims were open to it to test its right to recover what it had claimed and had been refused.

This court, in its opinion affirming the decision of the Court of Claims in the *Oregon-Washington Railroad & Navigation Co.* case, 255 U. S., at page 347, said:

> "We are forced, therefore, to conclude that appellant's non-action was deliberate, based upon a consideration of its advantages, with no thought of ultimate assertion against the decision of the Government until stirred to acquisitiveness by the decision in the Chicago, Milwaukee & St. Paul case. * * * These views lead to an affirmance of the judgment upon the record as it now stands. It should be said, however, that they are based on the concessions of appellant to the action of the accounting officers."

In *Longwill vs. United States,* 17 Ct. Cls. 288, the court held that the rejection or disallowance of a claim by the accounting officers leaves the claimant free to sue in the Court of Claims, although he may have accepted the portion of his claim allowed by the accounting officers.

The rule applied in the present case is a departure from principles long regarded as settled. It is inexact and inconsistent and will lead to uncertainty and constant controversy. As applied by the Court of Claims it is an elastic rule which may or may not bar a claim depending on the peculiar facts of each case and the merit of the claim as it appeals to the court. The present attitude of the Court of Claims is indicated by its recent decision in *Penn Bridge Co. vs. United States,* decided October 20, 1924, wherein it said:

"Another question is presented. Plaintiff's im in the sum of $2,591.80 was settled in the General Accounting Office and as settled $1,675.30 was disallowed and $916.50 allowed, for which latter sum a Treasury check was sent to plaintiff. Plaintiff made application to the Comptroller General for a review of the settlement and therewith returned the check. This was in exact compliance with the practice under the Dockery Act, when the settlement was first made by an auditor from whom the appeal was to the Comptroller, and is perpetuated now with the substitution of a division in the General Accounting Office for the office of the auditor. An acceptance of the check sent would have precluded an appeal or review, as now designated, of the settlement. After the Comptroller General, upon review, had sustained the settlement as made the check was again sent to plaintiff who received it and cashed it, without further protest, and five months thereafter brought this suit. It is contended that by this acceptance without further protest the plaintiff estopped itself from recovery in this court and decisions of this court are cited in support of the contention.

We have denied recovery in a number of cases where settlements made by auditors have been accepted without protest and where long delay or other circumstances have justified the conclusion that there was acquiescence in the settlement as made, and we have rather stringently held to the rule, for reasons stated, that there must be some course of conduct repudiating the idea of acquiescence in the settlement. We adhere to the doctrine laid down in those cases and it may be said that, to the extent that the question has received the attention of the Supreme Court, this doctrine of acquiescence has met with approval. But the facts in each must determine whether it comes within the rule and we think this case does not."

There is no sanction in the law for such a rule. It is inconsistent with previous decisions of the Court of Claims and of this court, and, as we shall presently argue, with the statutes conferring jurisdiction on the Court of Claims and prescribing a period of limitation for the presentation of claims.

The cases cited in the opinion in support of the court's decision are not applicable, for the following reasons:

In *Chicago, Milwaukee & St. Paul Railway Co. vs. Clark*, 178 U. S. 353, 367, which was a suit on a construction contract, this court said:

> "And the cases are many in which it has been held that where an aggregate amount is in dispute, the payment of a specified sum conceded to be due, that is, by including certain items but excluding disputed items, *on condition that the sum so paid shall be received in full satisfaction*, will be sustained as an extinguishment of the whole." (Our italics.)

There is nothing in the findings of fact in this case to lead to the conclusion that the settlement made by the Auditor for the War Department was "on condition" that the amount paid must be accepted as in full satisfaction, or that the plaintiff accepted it in full satisfaction, or that the Auditor had any authority or any idea of imposing such a condition.

In *Savage vs. United States*, 92 U. S. 382, 388, the plaintiff was the holder of treasury notes due and payable. He demanded payment in gold, but the Secretary of the Treasury refused to pay in gold and offered payment in legal-tender notes. The plaintiff accepted payment in legal-tender notes and sued for

the difference in value between them and gold money. This court, affirming th Court of Claims, held that by accepting the medium offered and surrendering the treasury notes, the plaintiff waived his claim to payment in gold. The present case is not the same because here the dispute was over the amount due and there was no attempt on the part of the Auditor to force the plaintiff to accept a final settlement or to surrender its claim. In the *Savage* case the dispute was over the medium of payment and the Secretary of the Treasury refused to pay anything whatever except as a final payment and upon condition that the treasury notes be surrendered and canceled. He paid the full amount due, although in a different medium from that claimed by the plaintiff, and the plaintiff surrendered the treasury notes.

In *Pacific Railroad vs. United States,* 158 U. S. 118, 122, this court held that where Congress had made appropriations to pay a judgment with a proviso that the sums appropriated "shall be in full satisfaction of the judgment," etc., and the payment had been accepted by and paid to the plaintiff, it could not by another suit in the Court of Claims recover interest thereon, even assuming that interest were allowable under R. S. 1090.

2. *It has the effect of cutting down the jurisdiction of the Court of Claims, contrary to the statute conferring jurisdiction, by imposing a new statute of limitations less than the six years prescribed by Sec. 156 of the Judicial Code.*

By section 145 of the Judicial Code jurisdiction is conferred on the Court of Claims "to hear and determine * * * all claims (except for pensions)

founded upon * * * any contract, express or implied, with the Government of the United States."

By section 156, the jurisdiction is limited by the provision that every claim "shall be forever barred unless the petition setting forth a statement thereof is filed * * * within six years after the claim first accrues."

Under section 145, the plaintiff clearly has the right to sue for its compensation earned for transportation service. It follows, therefore, that under section 156 it has that right at any time within six years, provided it has not in the meantime *expressly* and *voluntarily* relinquished or abandoned its claim. The mere fact that it has in the first instance applied to the Auditor for the War Department for settlement of the claim and been paid a part of it by him, cannot have any effect on the right to sue in the Court of Claims, provided there has not been a voluntary surrender of the balance of the claim remaining unpaid.

If the circumstances are such that it appears there was such a surrender or an acquiescence in the reduced payment made or an acceptance of the settlement as in full (as may happen in some cases), then there is foundation for a ruling that the claim is barred, notwithstanding the fact that the petition may be filed within six years. But in order to bar a claim filed within six years it must appear that the claimant has voluntarily and intentionally surrendered it. In such cases the burden rests on the Government to show that there has been on the part of the claimant an intention to accept an administrative settlement as in full. The plaintiff should not be required to show *affirmatively* that it has *not* accepted the settlement as in full. Under the rule applied by the Court of

Claims in this case the burden is placed upon the plaintiff of proving affirmatively that it has not accepted the settlement as in full.

The lapse of time, even one day less than six years, cannot affect the plaintiff's right. The exercise of that right, which is a statutory right, in the manner prescribed by the statute, *i. e.*, the filing of suit within six years from the time the service was rendered, cannot be taken as evidence of the abandonment of the right. *United States vs. American Bell Telephone Co*, 167 U. S. 224, 246-247.

The rule was established in *Clyde vs. United States*, 13 Wall., 38, decided in 1871, that the Court of Claims cannot limit its jurisdiction by requiring a claimant to present his claim to an executive department before filing his suit in the Court of Claims. But that is substantially what the decision in the present case amounts to. The Court of Claims, although having original and independent jurisdiction, holds that because the plaintiff failed "to indicate that the acceptance of the Auditor's allowance was under protest and with a purpose to proceed further," it cannot now recover. Yet admittedly it might have sued in the Court of Claims to recover the full amount claimed without going to the Auditor at all, and the court would have had jurisdiction. The court now denies jurisdiction simply because the plaintiff did not do something more, although in fact and in law it was not required to do anything at all so far as the jurisdiction of the Court of Claims was concerned. The rule imposed by the court in this case and the denial of jurisdiction is contrary to the principle established in the *Clyde* case.

In the *Finney* case, 32 Ct. Cls. 546, it was held that

the right of a claimant to sue in the Court of Claims is dependent upon the act of Congress, and that unless his acceptance of a less sum than that claimed is by way of accord and satisfaction his right to sue for the balance claimed is open, under the statute conferring jurisdiction on the Court of Claims. It follows, therefore, that in cases where there is no evidence of an accord and satisfaction, the court cannot impose a rule indirectly requiring the plaintiff to sue within a certain time less than six years or otherwise to impose restrictions on his right to sue in the Court of Claims.

The *Oregon-Washington R. & N. Co.* case, 255 U. S. 339, is not in conflict with this argument. In that case the plaintiff voluntarily relinquished its claim *at the time it submitted its accounts on a net land-grant basis,* and consequently, from the moment those accounts were settled and paid, it had no standing in court because it had no claim on which to sue. There was no question of waiting two years or more; it was all over the moment the settlements were made. But in this case the plaintiff had not lost its right to proceed further when the Auditor made his settlement and disallowance. The plaintiff had then surrendered nothing. It might have appealed to the Comptroller of the Treasury. It might have filed suit immediately in the Court of Claims. It had one year within which to appeal to the Comptroller, if it chose to do so, although such an appeal was not necessary to give jurisdiction to the Court of Claims. It had six years (or supposed it had six years), from the time the service was rendered, in which to sue in the Court of Claims. The claim was not extinguished by the Auditor's settlement.

The judgment of the Court of Claims should be reversed and it should be directed to enter judgment for the plaintiff for the amount shown to be due.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1924

No. 310

THE ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY, APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

STATEMENT

Appellant sued to recover $11,818.08—the aggregate of seven items. Two were abandoned as barred by the statute of limitations (Tr. 8) and two were relinquished as having been paid (Tr. 7, 8). Three remain in dispute.

G-480

1. This claim arose under bill of lading for $2,549.08 and on May 10, 1920, settlement was made by the Auditor for the War Department after a

reduction of $1,692.96, in order to allow for the carriage of military impedimenta under a tariff on which " associated travelers traveling on one ticket might become entitled to a baggage car free for the transportation of certain of their effects on the basis generally of one car free to each 25 passengers " (Tr. 4, 7), in pursuance of ruling of the Comptroller of the Treasury (*Louisville & Nashville Railroad,* June 18, 1918, 24 Decisions of Comptroller, 774; *St. Louis, Brownsville & Mexico Railway Co.*, October 31, 1918, 25 Decisions of Comptroller, 354).

Without objection or protest the amount allowed by the Auditor was accepted by the appellant and no appeal to the Comptroller for revision of the Auditor's settlement was ever taken.

For the reversal of the opinion and judgment of the Court of Claims holding that the claim was settled, counsel for appellant argue that protest was unnecessary; that appellant is not foreclosed by the settlement; that the Court of Claims has cut the six years' statute of limitations (Br. 10), and that the deduction and settlement on May 10, 1920, were made " when the question of the right of the Government to the free baggage car tariffs was very much in controversy." (Tr. 8.)

The claim arose October 26, 1916 (Tr. 8), the Auditor settled in May, 1920, and the suit was commenced on August 22, 1922.

ARGUMENT

THE ACCEPTANCE OF THE PAYMENT OF THE UNLIQUIDATED ACCOUNT WITHOUT PROTEST OR OTHER MANIFESTATION OF INTENTION TO MAKE FURTHER CLAIM FORECLOSES THE RIGHT OF THE APPELLANT TO MAINTAIN THE SUIT

The so-called Dockery Act approved July 31, 1894 (28 Stat. 206), provides:

> SEC. 7. Accounts shall be examined by the Auditors as follows:
>
> * * * * *
>
> Second. The Auditor for the War Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of War and all bureaus and offices under his direction, all accounts relating to the military establishment, armories and arsenals, national cemeteries, fortifications, public buildings and grounds under the Chief of Engineers, rivers and harbors, the Military Academy, and to all other business within the jurisdiction of the Department of War, and certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate to the Secretary of War.
>
> * * * * *
>
> SEC. 8. The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the

head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: *Provided,* That the Secretary of the Treasury may, when in his judgment the interests of the Government require it suspend payment and direct the reexamination of any account.

Upon a certificate by the Comptroller of the Treasury of any differences ascertained by him upon revision the Auditor who shall have audited the account shall state an account of such differences, and certify it to the Division of Bookkeeping and Warrants, except that balances found and accounts stated as aforesaid by the Auditor for the Post Office Department for postal revenues and expenditures therefrom shall be certified to the Postmaster General.

Any person accepting payment under a settlement by an Auditor shall thereby be precluded from obtaining a revision of such settlement as to any items upon which payment is accepted; but nothing in this act shall prevent an Auditor from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. When suspended items are

> finally settled a revision may be had as in the case of the original settlement. Action upon any account or business shall not be delayed awaiting applications for revision: *Provided,* That the Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant is issued in payment of an account certified as provided in sections seven and eight of this Act. (28 Stat. 207, 208.)

Twice in its opinion the Court of Claims emphasized the argument of apellant that the right of the Auditor for the War Department to make deduction " was very much in controversy " (Tr. 8, 9). For that reason if for no other, if appellant was not satisfied it should have protested the settlement. Accepting settlement with the disallowance without protest of items " very much in controversy " is a crumbling foundation on which to base a suit. An efficient Auditor would naturally not allow such claims. A claim which " is very much in controversy " is unliquidated. A liquidated claim is not " very much in controversy." *Century Dictionary: liquidate:* to clear up, reduce to order or precision; settle the particulars of; adjust; as to liquidate the affairs of a bankrupt firm. To clear off; settle; pay: as, to liquidate a debt or mortgage; *unliquidated:* not liquidated; not settled; unadjusted: as an unliquidated debt; unliquidated accounts.

In *Fleckner* v. *United States Bank*, 8 Wheat. 338, 362, Mr. Justice Story, in delivering the opinion of the court, said:

> Some criticism has been employed on the meaning of the word "liquidate," in the resolution above stated. It is said to mean not a payment, but an ascertainment of the debts of the bank. We think otherwise. Its ordinary sense, as given by lexicographers, is to clear away, to lessen debts. And in common parlance, especially among merchants, to liquidate a balance means to pay it; and this, we are satisfied, was the sense in which the words were used in this resolution; and, consequently, that the appropriation of this note to the payment of the debt, was within the scope of the authority given to the president and cashier.

The acceptance without protest of the Auditor's allowance and the failure at the time to give notice of intention to make further claim forecloses recovery now. Able counsel for appellant make no claim of fraud or mistake. The statute alone is sufficient. The adjudicated cases are likewise against the appellant.

Opposing counsel argue (Br. 17) there is nothing in the findings "to lead to the conclusion that the settlement made by the Auditor for the War Department was 'on condition' that the amount paid must be accepted as in full satisfaction, or that the plaintiff accepted it in full satisfaction, or that the Auditor had any authority or any idea of imposing such a condition." But under the

statute the responsibility for imposing the "on condition" rested with the appellant and not with the Auditor. Bill No. G–480 was an "*item*" for $2,549.08. It so appears in appellant's petition; it is so designated in the findings (Tr. 6); it never was anything else. Section 8, *supra*, provides "any person accepting payment under a settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement *as to any items* upon which payment is accepted."

In *Oregon-Washington Railroad Co.* v. *United States*, 255 U. S. 339, 346, this Court, speaking through Mr. Justice McKenna, said:

> Counsel seem to make a merit of this uncomplaining and unresisting acquiescence and observe that the Government by it obtained the advantage of the plea of the statute of limitations. The fact is significant. It is inconsistent with the reservation of a right and an intention to subsequently make a judicial assertion of it. Creditors are not usually so indulgent and the appellant had remedies at hand. The courts were open to it, certainly protest was open to it. Its explanation for this non-action is not satisfactory. "It is advised and believes," is its allegation, and now its contention, that "its auditors and agents were led and constrained to render its bills and vouchers . . . at tariff rates with land-grant deductions, because said shipments were for the Quartermaster's Department of the Army and upon *Government* bills of lading which in terms are only applicable to 'Gov-

ernment property' and 'public property,' *and also (because) the Comptroller of the Treasury (whose decisions are by law made final and controlling upon the Executive Departments of the Government) had held that such transportation, upon Government bills of lading, when within the amount authorized to be transported by Departmental regulations at the expense of the Government, was quasi-public property and entitled as such to land-grant rates,"* and that it did not intend to waive its right to payment in full or to sue, "if so advised," for the balances due "so far as the same were not barred by the statute of limitations."

The italics are counsel's and we repeat them as they give emphasis to counsel's conviction of the justification of the excuse. We do not share it. The mere mechanism of the bills of lading or their false designations of the property transported could not have imposed on anybody, certainly not on "the auditors and agents" of a railroad company; and the decisions of the Comptroller were as much open to dispute then as now and resort to suit an inevitable prompting, and yet, we have seen, the statute of limitations was permitted to interpose its bar. The excuse of appellant is hard to credit. Its "auditors and agents" were not ignorant of affairs, nor unpractised in the controversies of business, and the means of their settlement. The auditors and agents of railroad companies are not usually complaisant to denials of the rights of the com-

panies they represent. We do not say this in criticism, for such is their duty, the necessary condition of their places.

We are forced, therefore, to conclude that appellant's non-action was deliberate, based upon a consideration of its advantages, with no thought of ultimate assertion against the decision of the Government until stirred to acquisitiveness by the decision in the *Chicago, Milwaukee & St. Paul Case,* a decision which we may say, in passing, was declared by the Court of Claims to have been improvidently given. *Baltimore & Ohio R. R. Co.* v. *United States,* 52 Ct. Clms. 468.

The case therefore falls within the rulings of *United States* v. *Bostwick,* 94 U. S. 53; *Baird* v. *United States,* 96 U. S. 430; *Railroad Company* v. *United States,* 103 U. S. 703; *Central Pacific R. R. Co.* v. *United States,* 164 U. S. 93. And they have supplemental force in *United States,* v. *Edmonston,* 181 U. S. 500; *Utermehle* v. *Norment,* 197 U. S. 40.

Citing cases, Mr. Justice Butler, speaking for the Court on March 2, 1925, said: "Appellant did not protest against any land-grant deductions. It is bound by its acquiescence and consent and cannot recover the amounts deducted." *Louisville & Nashville* v. *United States,* No. 29.

In *Pacific Railroad* v. *United States,* 158 U. S. 118, 121, the Company accepted a certain sum in full satisfaction of a judgment and subsequently sued to recover interest; this court denied right of recovery, citing *Stewart* v. *Barnes,* 153 U. S. 456, in

which this court held that when a person from whom an internal revenue tax had been illegally exacted, accepted from the Government the precise amount of the sum thus illegally exacted, he thereby gave up his right to sue for interest as incidental damages; and *De Arnaud* v. *United States,* 151 U. S. 483, where it was held that the receipt by a claimant against the United States for a sum less than he had claimed, paid him by the disbursing agent of a department " in full for the above account," is, in the absence of allegation and proof that it was given in ignorance of its purport, or in circumstances constituting duress, an acquittance in bar of any further demand—citing *Baker* v. *Nachtrieb,* 19 How. 126, and *United States* v. *Childs,* 12 Wall. 232.

The leading case of *Chicago, Milwaukee & St. Paul Railway* v. *Clark,* 178 U. S. 353, 368, 369 is cited by the Court of Claims in its opinion (Tr. 9). There a contractor who had constructed part of the railroad failed to complete the work by a certain stipulated day; disputes arose in the settlements and on the payment of a certain sum he executed a full release; later he sued on the disputed claims and recovered judgments in the lower courts; in reversing, this Court, speaking through Mr. Chief Justice Fuller, citing *Baird* v. *United States,* 96 U. S. 430, to the effect that " if the debt be unliquidated and the amount uncertain," * * * " the question is whether the payment

was in fact made and accepted in satisfaction," said:

> Without analyzing the cases, it should be added that it has been frequently ruled by this court that a receipt in full must be regarded as an acquittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purport, or in circumstances constituting duress, fraud, or mistake. *De Arnaud* v. *United States,* 151 U. S. 483; *United States* v. *Garlinger,* 169 U. S. 316, 322; *United States* v. *Adams,* 7 Wall. 463; *United States* v. *Child,* 12 Wall. 232; *United States* v. *Justice,* 14 Wall. 535; *Baker* v. *Nachtrieb,* 19 How. 126.
>
> The general principle applicable to settlements was thus expressed by Mr. Justice Clifford, in *Hagar* v. *Thomson,* 1 Black, 80, 93: "Much the largest number of controversies between business men are ultimately settled by the parties themselves; and when there is no unfairness, and all the facts are equally known to both sides, an adjustment by them is final and conclusive. Oftentimes a party may be willing to yield something for the sake of a settlement; and if he does so with a full knowledge of the circumstances, he can not affirm the settlement and afterwards maintain a suit for that which he voluntarily surrendered."

In *De Arnaud* v. *United States,* 151 U. S. 483, it was held that a receipt signed by a claimant for a

sum less than he had claimed " in full for the above account " is a bar to any further demand.*

In *Merritt* v. *Cameron,* 137 U. S. 542, 551, the importer brought suit to recover duties alleged to have been illegally exacted; the collector had ascertained the amounts and the taking of such other steps as the law called for; holding that the ten days within which an importer is allowed to protest against the liquidation of duties begin to run upon their ascertainment and liquidation, that protest subsequent thereto came too late, this court in reversing the judgment, said:

> Upon a careful examination of the question at issue, we are of opinion that the ascertainment and liquidation of the duties upon merchandise entered in bond for warehouse may take place at any time after the original entry of the merchandise, and that it is not required to be delayed until the importer chooses to withdraw his goods for consumption. The ten days referred to in section 2931, within which the importer is allowed to protest, begin to run upon such ascertainment and liquidation of the duties;

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* Maj. Gen. John C. Fremont employed Charles de Arnaud for secret service in the Civil War. In advance of the arrival of Confederate troops General Grant took possession of Paducah, Ky., on information furnished by De Arnaud. The latter sued for $100,000 for services rendered as a "military expert." In another case under a contract made with President Lincoln one Lloyd had rendered valuable services as a spy and recovery for additional compensation had been denied to his administrator because of a settlement. Declining to distinguish the *Lloyd case,* Mr. Justice Shiras said: "We are relieved from considering whether the new-fangled term 'military expert' is only an old 'spy,' 'writ large.'"

and, therefore, the protest in the case at bar was too late.

In *Hennessy* v. *Bacon*, 137 U. S. 78, 85, this Court, speaking through Mr. Justice Harlan, said:

> It is the case of the compromise of a disputed claim, the parties dealing with each other upon terms of perfect equality, holding no relations of trust or confidence to each other, and each having knowledge, or having the opportunity to acquire knowledge, of every fact bearing upon the question of the validity of their respective claims. *Cleaveland* v. *Richardson*, 132 U. S. 318, 329. Such a settlement ought not to be overthrown, even if the court should now be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained.

See also *French* v. *Shoemaker*, 14 Wall. 314, 333, 334; *Baird* v. *United States*, 96 U. S. 430; *De Wolf* v. *Hays*, 125 U. S. 614; *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196, 216.

In *United States* v. *Cousinery*, 25 Fed. Cases, 677, 679 (Case 14,878) District Judge Blatchford said:

> It is contended, for the defendants, that there was no decision of the collector made in this case, within the meaning of the statute. The evidence at the trial showed that everything was done in this case in respect to the ascertainment and liquidation of the duties by the proper officers of the customs, which is ever done in any case, to perfect and indicate and record such ascertainment and liquidation. The

usage and practice of the collector's office was shown, to which the proceedings in this case conformed. The 14th section of the act of 1864 uses the phrase "decision of the collector of customs," and the phrase " ascertainment and liquidation of the duties by the proper officers of the customs," as synonymous phrases. The decision of the collector is declared to be conclusive, unless the party, if dissatisfied with his decision, gives notice thereof " within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs," and also, " within thirty days after the date of such ascertainment and liquidation," appeals "therefrom " to the secretary of the treasury. Such ascertainment and liquidation of the duties by the proper officers of the customs, that is, the proper officers in the collector's office or department, is the decision of the collector. An appeal from such ascertainment and liquidation is an appeal from the decision of the collector, and an appeal from the decision of the collector is an appeal from such ascertainment and liquidation. Congress must be assumed to have been legislating in reference to a well understood course of business, conducted under the revenue laws, when it speaks of " the ascertainment and liquidation of the duties by the proper officers of the customs," and to have intended that, when the duties were ascertained and liquidated in the usual manner by such officers, and the usual indicia thereof by checks and stamps were placed on the usual

> papers in the collector's office, such transaction was the decision of the collector of customs in the premises. See Act March 2, 1799, §§21, 49 (1 Stat. 642, 664).

In *Savage* v. *United States,* 92 U. S. 382, 388, this Court, speaking through Mr. Justice Clifford, stated the controlling rule as follows:

> Parties having claims against the United States, which are disputed by the officers authorized to adjust the same, may compromise the claim, and may accept payment in a different medium from that promised, or may accept a smaller sum than that claimed; and where it appears that the claimant voluntarily entered into a compromise, and accepted payment in full in a different medium from that promised, or accepted a smaller sum than that claimed, and executed a discharge in full for the whole claim, or voluntarily surrendered to the proper officer the evidences of the claim for cancellation, he cannot subsequently sue the United States, and recover in the Court of Claims for any part of the claim voluntarily relinquished in the compromise. *Sweeny* v. *United States,* 17 Wall. 77; *United States* v. *Child,* 12 id. 244; *United States* v. *Justice,* 14 id. 549.
>
> Decisions of the kind by this court are quite numerous, and they show beyond all doubt that parties may adjust their own controversies in their own way, and that when they do so voluntarily, and with a full knowledge of their rights and all the circum-

stances, no appeal lies to the courts to review their mutual decision. Courts can not make contracts for parties; and if parties understandingly contract to adjust a controversy between them in a particular way, and actually execute the contract, they are both bound to regard the controversy as at an end.

The language of the Court of Claims is appropriate (Tr. 9):

> The auditor's action is final and conclusive upon the executive branch. The policy of the statute should not be ignored and should have some consideration when a party whose accounts have been settled by the proper auditor appeals to the court, for an additional amount to that received upon the auditor's certificate. The plaintiff's argument that when the deduction was made from its bill by the auditor the question of the right to make it "was very much in controversy" does not show sufficient reason for accepting the auditor's conclusion without any attempt to secure its revision by the comptroller or for its failure to signify any timely objection to this conclusion. As to these controverted items the plaintiff's account may be treated as unliquidated and its acceptance of the undisputed items a settlement of the entire claim. See *Chicago, Milwaukee & St. Paul Railway Co.* v. *Clark*, 178 U. S. 353, 367; *Savage case*, 92 U. S. 382, 388; *Pacific Railroad Company case*, 158 U. S. 118, 122.

This court in the case of Texas & Pacific Railway Company, 57 C. Cls. 284, 293, commented on the effect of the receipt of an allowance by an auditor and failure to protest against the disallowance of part of it, saying "there must be a time when public accounts are to be deemed settled; a time, without reference to statutes of limitation, when it may be assumed that settlements made are final, and it must be as early as circumstances will permit. That ordinarily will occur when, after an auditor's settlement, the allowance made is paid and payment accepted without any action or circumstances repudiating the idea of an acceptance of the settlement as final." The question was again presented in Atchison, Topeka & Santa Fe Railway Company case, No. B–90, decided November 5, 1923, and it was concluded that acceptance of payment under the auditor's allowance of part of the asserted claim without protest or some other action clearly indicating nonacquiescence in such settlement would bar further prosecution of the claim. While these and other cases recognize the right of parties to apply to the courts in proper cases, it is not unreasonable to require them to make known to the auditor or comptroller, in some appropriate way, the purpose, if there be any, to further prosecute their demands, notwithstanding the action of these officials. In such case the latter acting for the Government could either withhold any voucher or authorize payment of the part allowed and

> have some notice of the proposed further prosecution of the claim. As already stated, there must be an end of accounting. Texas & Pacific Railway Company case, 57 C. Cls. 284, 293. The failure to indicate that the acceptance of the auditor's allowance was under protest and with a purpose to proceed further bars recovery in this suit. The claim was settled.

In *Savage Arms Corporation* v. *United States,* 266 U. S. 217, this Court, speaking through Mr. Justice Sutherland, said:

> The attempted reservation came too late. Either it was a mere afterthought or there was a concealment of purpose, on the part of appellant during the negotiations, amounting to bad faith. Whether the agreement was made reluctantly, or appellant got the worst of the bargain, are matters unnecessary to be considered. It is enough that, without fraud or coercion, it did agree.

In *United States* v. *Cramp,* 206 U. S. 118, 128, this Court, speaking through Mr. Justice Brewer, said: " If parties intend to leave some things open and unsettled, their intent so to do should be made manifest."

As late as March 2, 1925, this Court re-affirmed the effect to be given to settlement of disputed claims. (*The St. Louis, Kennett & Southeastern Railroad Company* v. *United States,* No. 229, this Term; *Cairo, Truman & Southern Railroad Company* v. *United States,* No. 230, this Term, per Mr. Justice Brandeis.

2. The findings show that on September 20, 1920, this appellant filed petition No. 34697 in the Court of Claims in which the foregoing items (No. 3055 for $1,257.50; No. 4732 for $525) were included in the aggregate sums claimed. Based on a stipulation of the parties that Court made findings of fact and judgment went for $22,624.78, which was paid (Tr. 7). Those findings showed that " the numbers and amounts referred to in the foregoing paragraphs constitute the component parts and sum total of the said $22,624.78, and are the *only items in question in the case at bar.*" In those findings No. 3055 and No. 4732 are not mentioned. The report of the Treasury Department filed in that case and upon which the stipulation of facts was based stated that because no deduction had been made " from these bills on account of the cause of complaint set forth in petition nothing is due in recovery."

In the instant case the items reappeared in enlarged amounts, No. 3055 for $2,604.34 and No. 4732 for $566.80. Holding that these items were included in the former petition as " They were stated in the petition " and " The question is set at rest by section 178, Judicial Code," the Court of Claims dismissed the petition.

ARGUMENT

THE INCLUSION OF THE ITEMS IN THE FORMER PETITION ON WHICH JUDGMENT WAS STIPULATED AND PAID WITHOUT RESERVATION FORECLOSES THE RIGHT OF THE APPELLANT TO MAINTAIN THE SUIT

Opposing counsel say they rely on *Spicer* v. *United States,* 5 Ct. Cls. 34 and *Book* v. *United States,* 31 Ct. Cls. 272, for reversal.

The Judicial Code provides:

> SEC. 178. The payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law, as provided by law, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy. (36 Stat. L. 1141.)
>
> SEC. 179. Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy. (36 Stat. L. 1141.)

Observe the repetition of the almost identical words, "shall be a full discharge * * * of all claim and demand touching any of the matters involved in the controversy" and "shall forever bar any further claim or demand * * * arising out of the matters involved in the controversy." That items No. 3055 and No. 4732 were included in No. 34697 is not denied. The payment of the $22,624.78 was in satisfaction of a judgment entered on a stipulation of facts for the settlement of

that case. The very basis for sections 178 and 179 is set forth in the *Spicer* case, thus (5 Ct. Cls. 37):

> At the time when this court was invested with judicial power, it had become the custom of claimants in and about Congress so soon as they procured relief to immediately seek more. Thus, on the claim of Fisher, of which the history is given in *Gordon's Case* (1 C. Cl's. R., p. 1), there was first allowed $8,873 for property destroyed by United States troops; then $100 for an error of calculation in the first "award"; then $8,997.94 for interest; then $10,004.89 for more interest; then $39,217.50 for property previously found *not to have been destroyed by United States troops;* and finally $66,519.85 on a "*revision*" of the previous awards. The provisos cited from the act of 1863 were probably inserted to prevent such legislative leniency from being misinterpreted into a rule of judicial action.

In the *Spicer* case the Court of Claims declined to hold that where a judgment rendered on demurrer, alleging the want of a material fact in the declaration, shall be a bar to a second action presented by a declaration wherein the material fact omitted from the first is sufficiently averred (5 Ct. Cls. 37).

In *Book* v. *United States,* 31 Ct. Cls. 272, the case had been pending for a long time awaiting the decision of the Supreme Court in other cases involving the same question of law. The case was dismissed on motion of the Attorney General "as a

neglected case under Rule 24." Upon learning of the dismissal claimant moved to reinstate the case and the motion was granted without argument. The plea of *res adjudicata* was overruled and claimant recovered.

Neither the *Spicer* case nor the *Book* case has any bearing on the instant case.

In *Vaughn* v. *United States,* 34 Ct. Cls. 342, cited by the Court of Claims in the instant case, by stipulation claimant accepted $211.57, allowed by judgment of the Court of Claims, which " shall be without prejudice to the motion by claimant for an additional allowance." Subsequently, claimant moved to set aside the judgment and grant a new trial claiming that by newly discovered evidence he was entitled to a judgment for $305.69. On the authority of *United States* v. *Frerichs,* 124 U. S. 315, 320, the Court of Claims held that under the foregoing statute it was without jurisdiction to entertain the motion.

In the latter case this Court said (124 U. S. 320):

> The payment of the amount of judgment would *ipso facto* satisfy the demand of Frerichs against the United States, because it is provided by § 1092 of the Revised Statutes that " the payment of the amount due by any judgment of the Court of Claims, and of any interest thereon allowed by law," " shall be a full discharge to the United States of all claim and demand

touching any of the matters involved in the controversy."

CONCLUSION

The judgment of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

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1. The undisputed facts shown by the record compel the legal conclusion that both petitioner and respondent were engaged in interstate commerce at the time of said accident, and this case is governed exclusively by the Federal Employer's Liability Act. The Supreme Court of the State of Oklahoma erred in holding that the case was not governed exclusively by said Act ---------- 23

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NUMBER 1051

In the Supreme Court of the United States

OCTOBER TERM, 1924

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, PETITIONER,

vs.

HARRY F. STITT, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

(Page references in printed petition and brief refer to pages of printed record.)

To the Honorable, the Supreme Court of the United States:

The St. Louis-San Francisco Railway Company, in support of this, its petition for writ of certiorari to be directed to the Supreme Court of Oklahoma, to review a decree of judgment rendered on the 18th day of September, 1923, and order denying petition for rehearing by said court on the 24th day of February, 1925, which said petition for rehearing had been filed according to the rules of and

with the permission of said court, and which said decree and order affirmed a judgment of the District Court in and for Pawnee County, State of Oklahoma, entered on the 29th day of November, 1921, in favor of respondent, Harry F. Stitt, and against this petitioner, in the sum of $20,000, damages alleged to have been sustained by respondent on account of personal injuries while an employe of said petition, shows:

I.

That this action was begun by petition under the Statutes of the State of Oklahoma, filed by Harry F. Stitt, claiming damages by reason of personal injury which occurred in the course of his employment as a boiler maker in the shops of petitioner at Tulsa, Oklahoma, on the 3rd day of September, 1920; that said petition alleged that respondent was injured by being struck in the eye by a sliver flying from the head of a prossering pin while said prossering pin was being struck by an air hammer in prossering the flues of an engine; that said pin was defective in that it had been improperly tempered, and was old, worn and battered; that petitioner was negligent in furnishing said pin in its said condition, which condition was known to

petitioner, or could have been known by ordinary care; that petitioner was further negligent in not furnishing respondent reasonably safe tools and appliances and a reasonably safe place in which to work (see petition, rec. 2-6).

Respondent also alleged in his petition, mistreatment on the part of the employes of petitioner in the hospital of petitioner, subsequent to his injury. However, the jury returned a separate verdict, fixing respondent's damages on account of said mistreatment in the sum of $1,000.00, which amount has been remitted by respondent and thus eliminated from this case (see rec., p. 122).

II.

That your petitioner duly filed its answer to said petition, denying negligence, and specially pleading that both petitioner and respondent were engaged in interstate commerce at the time of said accident, and that said case was governed exclusively by the Federal Act, known as the Federal Employers' Liability Act, and that respondent's injuries were the result of an assumed risk (see rec. pp. 9-10).

III.

That the record, a certified copy of which is

presented herewith, shows that there is no conflict of evidence regarding the question as to whether or not both petitioner and respondent were engaged in interstate commerce at the time of respondent's injuries, respondent relying solely upon the ground that the undisputed facts compelled the legal conclusion that both petitioner and respondent were not engaged in interstate commerce at said time.

IV.

The record shows petitioner was engaged in interstate commerce, operating a line of railway through the states of Missouri, Oklahoma and Texas (petition, rec. 3). The record further shows that respondent was a boiler maker employed by petitioner in its shops at Tulsa, Oklahoma; that at the time of the accident he was engaged in prossering flues of an engine which had been used exclusively for a long period of time for the purpose of pulling a passenger train from Tulsa, Oklahoma, to Enid, Oklahoma, and return (rec. 74); that the trains which said engine was used exclusively to pull were constantly engaged in carrying interstate passengers, interstate express and interstate United States mail from Tulsa, Oklahoma, to Enid, Oklahoma; that said trains constituted a link in a well

established channel of interstate transportation operated by petitioner from St. Louis, Missouri, through Tulsa, Oklahoma, to Enid, Oklahoma, and points west in the states of Oklahoma and California, and from Enid, Oklahoma, and points west, through Tulsa, Oklahoma, to St. Louis, Missouri, and points east; that on the day prior to the accident said engine had pulled its regular train from Enid, Oklahoma, to Tulsa, Oklahoma, carrying interstate mail, interstate express and interstate passengers, bound from Enid, Oklahoma, through Tulsa to points in Missouri, it being definitely established that four passengers on said train purchased tickets from the petitioner at Enid, Oklahoma, over its lines to Springfield, Missouri, and St. Louis, Missouri (rec. pp. 74-75); that on the day of said accident, and subsequent to said accident, the regular train which said engine pulled from Tulsa, Oklahoma, to Enid, Oklahoma, carried interstate passengers, interstate mail and interstate express (rec. pp. 76-77); that the character of repairs being performed by respondent at the time of his injuries were not such that took said engine out of service, or caused it to lose any time, but were what is known as "hot work" (rec.

p. 34), and were performed during the time that it was necessary for said engine to lay over in Tulsa, between its regular trips, but were necessary for the purpose of maintaining said engine and enabling it to do its interstate work; that said engine did not lose any time on account of said repairs, but made its regular trip from Tulsa, Oklahoma, to Enid, Oklahoma, on the day of the accident, leaving Tulsa on its schedule time within a few hours after said accident.

V.

The record further shows that at the time of the accident respondent was engaged in prossering flues in said engine by means of a prossering pin, prossering ring and air hammer, all of which were furnished by petitioner; that said engine had been placed over a pit, the fire drawn from it, and its fire box allowed to cool, after which respondent, together with his helper, had gone into the fire box, and at the time of the accident were engaged in prossering its flues; that the flues were prossered by the prossering pin being placed in the hole in the prossering ring, and both ring and pin placed in the flue, and the big end of the pin struck by the air hammer; that, while doing this work, respond-

ent was holding the pin, and his helper operated the air hammer; after respondent and his helper had been at work for about thirty minutes a sliver flew from the head of the prossering pin and struck respondent in the eye, causing his injury (rec., p. 22). Respondent testified that the pin slivered by reason of the fact that it had not been properly tempered at the time it was made; that if it had been properly tempered it would not have slivered (bottom of 29).

VI.

The record further shows that petitioner purchased its prossering pins from J. Faessler Manufucturing Company of Moberly, Missouri, established and recognized dealers in such tools; that said firm supplied nearly all of the big railroad companies with such tools, and had done so for a long time (rec. pp. 71-73 and 103-104); that petitioner's tools used by its employes at Tulsa, including its prosser pins, were inspected by the foreman about once a week, and oftener if defects occurred (rec. p. 98).

VII.

The record further shows that kerosene torches

were used as lights in performing this character of work. One of respondent's witnesses testified that it had been the custom at Tulsa, for many years, to use the kerosene torch in performing such work; that it was used in hot work for the reason that it could be moved about with less inconvenience (rec. 56, 58, 92 and 97).

In this connection there is no evidence shown in the record, of any character, tending to show that respondent's injuries were caused in any manner by reason of the kerosene torch being used instead of the electric light. Respondent testified that the pin slivered because it was improperly tempered and would not have slivered had it been properly tempered.

VIII.

The record further shows that the prossering pin being used by respondent at the time of the accident was a straight piece of steel about 9" in length, 1" in diameter at the big end, tapering to 7-16ths of an inch in diameter at the small end; that the prossering pin is the ordinary and common tool used by railroad men in prossering engine flues; that respondent was thoroughly familiar with a

prossering pin, having used prossering pins almost daily for many years. There was no contention on the part of respondent that the prossering ring or air hammer, or any appliance other than the pin itself, was, in any manner, defective.

IX.

At the conclusion of the testimony in the trial court, your petitioner requested the court to instruct the jury to return a verdict in its favor, which was refused, and exceptions saved.

X.

After your petitioner's request for a directed verdict had been refused, your petitioner submitted to the court its requested instruction No. 3, and requested that same be given. This instruction reads as follows:

> "You are instructed that the evidence in this case discloses that the tools which were being used by the plaintiff and his co-laborers, in repairing the engine at the time the injuries were received by the plaintiff, were purchased by the defendant from an independent company, and you are instructed in this respect that the degree of care which the law imposes upon the defendant in this connection is that its tools be purchased from a reputable and known establishment engaged in the business of manu-

facture and sale of said tools, and the defendant was entitled to rely upon said tools being reasonably safe and reasonably fitted to perform the work for which they were manufactured and sold, and unless the defect in the tool which resulted in the injury to plaintiff was obvious and apparent, or could be discovered by an inspection, then you are instructed that the defendant has discharged its duty in this respect to the plaintiff and could not be liable for latent defects in said tools, and the plaintiff herein assumed the risk of such injuries as are incident to and arise from the use of said tools in the business in which he was engaged,"

which request was refused, and exceptions saved (rec. p. 110).

XI.

Instead of giving your petitioner's requested instruction No. 3 as above quoted, the court gave to the jury paragraph No. 13 of the court's instructions to the jury, regarding the liability of your petitioner, which said instruction reads as follows:

"You are further instructed that if you find from a fair preponderance of the evidence that while the plaintiff was working in the general scope of his employment and in the exercise of ordinary care and caution while using a defective prosser pin, not knowing that the same was defective, and the same not being discoverable by the use of ordinary care on the part of plaintiff furnished to him by the defendant

herein, a piece of metal chipped or came off of said defective prosser pin while being used in the proper and ordinary way, striking the plaintiff in the left eye, thereby totally destroying the sight of the same, the plaintiff at all times acting within the general scope of his employment, and exercising ordinary care, then, and in that event, the plaintiff will be entitled to recover in such amount as by the evidence will compensate him, however, not to exceed fifty thousand dollars (rec. p. 118).

XII.

With regard to your petitioner's defense of assumed risk, the court, over the objection of your petitioner, gave to the jury paragraph No. 11 of the court's instructions to the jury, which reads as follows:

"You are instructed that the plaintiff herein in accepting the employment as boiler maker for the defendant, assumed all of the ordinary and usual risks and perils incident to such employment, whether they were dangerous or otherwise, and all of the risks he had knowledge of or may by the exercise of reasonable care have known to exist, unless there was some agreement or understanding to the contrary. The plaintiff did not, however, assume such risks as were created by the defendant's negligence, if any be shown, nor such as were latent or were only discovered at the time of the injury complained of by the plaintiff herein" (rec. p. 117).

XIII.

As a result of the trial, the jury returned a verdict against your petitioner in the sum of $30,000.00 (rec. p. 123). The trial court ordered a remittitur in the sum of $5,000.00 and entered judgment for $25,000.00 (rec. pp. 123-125). From this judgment your petitioner appealed to the Supreme Court of the State of Oklahoma, which court, on the 18th day of September, 1923, affirmed the judgment of the lower court (rec. pp. 128-136). A petition for rehearing was filed within the time allowed by the rules of the Oklahoma Supreme Court (rec. pp. 137-174), which was denied on December 18, 1923 (rec. p. 174). Within the time allowed by rules of the Supreme Court, application for leave to file second petition for rehearing was filed by petitioner (rec. pp. 175-183). This was also denied on January 22, 1924 (rec. p. 184). On February 5th, 1924, the Supreme Court set aside its order denying leave to file second petition for rehearing, and granted leave to file second petition for rehearing and said case was set for oral argument (rec. p. 184). On February 8, 1924, pursuant to said permission of the court, your petitioner filed its second petition for rehearing (rec. pp. 184-203).

On February 24th, 1925, after said case had been orally argued as per order of the Supreme Court, second petition for rehearing was denied (rec. p. 203).

XIV.

Both the trial court and the Supreme Court held that respondent was not engaged in interstate commerce at the time of the accident, and that the case was not governed by the Federal Employers' Liability Act. The Oklahoma Supreme Court held that the trial court had correctly instructed the jury regarding petitioner's liability, petitioner's negligence, the duties which petitioner owed to respondent, and petitioner's defense of assumption of risk. The Oklahoma Supreme Court also held that the case had been properly submitted to the jury and the evidence was sufficient, under the instructions of the court, to sustain the verdict of the jury regarding your petitioner's liability (see opinion, rec. p. 133).

XV.

It is your petitioner's contention:

(1) That the undisputed facts shown by the record in this case compel the legal conclusion that

both petitioner and respondent were engaged in interstate commerce at the time of said accident, and this case is governed exclusively by the Federal Employers' Liability Act.

The holding of the Oklahoma Supreme Court in this case is not in accord with the decisions of this Honorable Court, which has repeatedly held, in effect, that where an engine has been permanently set apart to the work of hauling interstate commerce, even between two points in the same state, those performing repairs on said engine necessary in order that it may continue in and efficiently perform its interstate work, are engaged in interstate commerce, or work so closely related to it as to be a part of it.

In holding that this case is not governed by the Federal Employers' Liability Act, the Oklahoma Supreme Court evidently followed its former decision in the case of *C., R. I. & P. Ry. Co.* v. *Cronin*, 74 Okla. 38, 176 Pac. 919, in which it held that where a locomotive was constantly used to pull interstate trains, and had been taken from its line tracks and placed in a round house for repairs, and where the repairs were performed in time for it to make its return interstate trip, the employes per-

forming said repairs were not engaged in interstate commerce.

Your petitioner is advised that there is a conflict between the holding of the Oklahoma Supreme Court in the Cronin case, *supra,* and in this case, and the ruling of the Circuit Court of Appeals and this Honorable Court on said question. See *Baltimore & O. R. Co.* v. *Darr,* 4th Circuit Court of Appeals, 204 Fed. 751; *Industrial Accident Commission* v. *Davis,* 259 U. S. 182, 66 L. ed. 888; *Pederson* v. *D., L. & W. Ry. Co.,* 229 U. S. 146, 57 L. ed. 1125.

That in view of the conflict of authority between the Oklahoma Supreme Court and the Federal Court, there has been created confusion and uncertainty with regard to the application of the Federal law, and doubt concerning the rights and obligations of employers of labor, which ought not to exist. That certain other like cases are pending in the trial courts, and the Supreme Court of Oklahoma, and it, therefore, follows that unless this Honorable Court shall correct the errors of the court below, your petitioner will be deprived of a right, privilege and immunity under the Federal Employers' Liability Act in this and all similar cases, brought hereafter in the State of Oklahoma.

In this connection, your petitioner calls this Honorable Court's attention to the fact that the statutes of the State of Oklahoma and the rulings of the Oklahoma Supreme Court, regarding cases brought under the state statutes, materially and substantially differ from the law as announced by the Federal Employers' Liability Act and the rulings of the Federal courts regarding same.

(2) It is the contention of your petitioner that the trial court, by giving to the jury paragraph No. 13 of the court's instructions to the jury as above quoted, deprived your petitioner of the right guaranteed to it by the terms of the Federal Employers' Liability Act, to have the jury instructed and the respondent required to prove, before recovery could be had that respondent's injuries were caused, in whole or in part, by the negligence of the officers, agents, or employes, of your petitioner, or by reason of some defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, etc.

By paragraph No. 13 of the court's instructions to the jury the jury were told, in effect, that if they found from the evidence that while respondent was

working with a defective prosser pin furnished him by his employer, the defect in said pin not being discoverable by ordinary care on the part of respondent, and while using ordinary care for his own safety, a piece of metal came off of said pin and struck respondent in the eye, injuring him, then they should find for respondent in any sum not exceeding $50,000.00.

This instruction amounted really to a direction that the jury return a verdict for respondent. The facts set forth in said instruction were not disputed. Respondent had testified as a conclusion that the pin was defective by reason of being improperly tempered and that he was injured by reason of a sliver flying from the head of said pin and striking him in the eye; that if the pin had been properly tempered this would not have occurred. He further testified that he could not discover the defect in the temper of the pin by an inspection thereof.

All of the things named in said instruction may have been true, and still your petitioner may not have been guilty of any negligence. Said instruction not only deprived your petitioner of its rights guaranteed under the Federal Employers' Liabil-

ity Act to require respondent to prove that said defect, if one existed, was due to its negligence, but it took away from your petitioner every legitimate defense plead and proved by it. For defense in this case your petitioner relied upon: (a) General denial of negligence; (b) Ordinary care in conducting inspections; (c) If any defect existed in the pin, said defect was latent and not discoverable by an ordinary inspection; (d) Assumption of risk on the part of respondent. There was an abundance of proof offered from which the jury might have found for your petitioner on any one of said defenses. Yet the above instruction took away from your petitioner all of said defenses, and told them that if they found the pin was defective, and was being used by respondent with ordinary care, and respondent was injured by reason of the defect, they should find for respondent regardless of negligence, regardless of inspection, regardless of latentness of the defect, and regardless of assumption of risk.

This Honorable Court has held in *Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S. 492, 58 L. ed. 1062, a Federal employers' liability case, that an instruction similar to the above deprived an em-

ployer of a right guaranteed to it under the Federal Act.

Instruction No. 13, in effect, directed the jury to return a verdict for respondent if they found certain undisputed facts to be true. It must be presumed, therefore, that the jury found for respondent by reason of said instruction, and not by reason of some other theory about which the evidence was in dispute.

It is the contention of your petitioner that the decision of the Supreme Court of Oklahoma in this case subverts the fundamental theory of the law, and its result is not only to relieve the claimant of the necessity of making essential proof, but to effectually deprive your petitioner of the protection of the Act of Congress invoked.

(3) It is the contention of your petitioner that the trial court in giving to the jury paragraph No. 11 of the court's instructions to the jury deprived your petitioner of the right to have said jury consider its defense of assumption of risk in case the jury should find that the risks were created or permitted to exist by reason of some negligence on the part of the railway company, and that the Su

preme Court of the State of Oklahoma erred in holding that the trial court had correctly instructed the jury in regard to your petitioner's defense of assumed risk.

By instruction No. 11 of the court's instructions to the jury the court told the jury, in effect, that the respondent in accepting employment from the railway company assum[illegible]d all of the ordinary and usual risks and peril[illegible]acident to such employment, *but did not, however, assume such risks as were created by petitioner's negligence.*

In *C., R. I. & P. Ry.* v. *Ward*, 252 U. S. 18, 64 L. ed. 430, this Court held an identical instruction with the above to be error, as it stat[illegible] without qualification, that the servant did not assume any risk created by the master's negligence.

In this case if the jury could have found under the evidence that the master was guilty of negligence in furnishing the pin, they should have been permitted to have gone further and found that respondent's many years of familiarity with such pins placed him in a position where he should have known that such pins, when struck as the pin in question was struck, would sliver, or that he

was in as good position to have known it as the master, and therefore that he assumed the risk, even though the master were negligent.

Wherefore, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Supreme Court of the State of Oklahoma, commanding that court to certify the case to this Court for a review and determination as provided in the Act of Congress known as the Judicial Code, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate and in conformity with the said Act.

W. F. Evans,
E. T. Miller,
C. B. Stuart,
J. F. Sharp,
M. K. Cruce,
Ben Franklin,
Attorneys for Petitioner.

Affidavit.

State of Oklahoma, County of Oklahoma, ss.

Ben Franklin, of lawful age, being duly sworn, says that he is one of the attorneys and of counsel for the St. Louis-San Francisco Railway Company, a corporation, petitioner named in a petition for certiorari filed with the Clerk of the Supreme Court of the United States on the 11th day of April, 1925 in the above styled and numbered cause, and has had personal charge of the prosecution of the appeal in said case from the District Court in and for Pawnee County, State of Oklahoma, to the Supreme Court of the State of Oklahoma, and the application for certiorari to be directed by the Honorable Supreme Court of the United States to the Supreme Court of the State of Oklahoma; that he has read said petition so filed, and by him subscribed, and that the statements and allegations made herein are true to the best of affiant's information and belief.

BEN FRANKLIN,

Subscribed and sworn to before me this the 20th day of April, 1925.

JUNE E. HEDGECOCK,

(Seal) Notary Public.

My commission expires January 27th, 1929.

No. 1051.

In the

SUPREME COURT OF THE UNITED STATES

October Term 1924

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION, PETITIONER,

vs.

HARRY F. STITT, RESPONDENT.

BRIEF AND ARGUMENT.

In this brief we will discuss the propositions relied on in our petition in the order as mentioned therein.

I.

The undisputed facts shown by the record compel the legal conclusion that both petitioner and respondent were engaged in interstate commerce at the time of said accident, and this case is governed exclusively by the Federal Employers' Liability Act. The Supreme Court of the State of Oklahoma erred in holding that the case was not governed exclusively by said Act.

Both the Supreme Court of the State of Oklahoma and the trial court, before whom this case was tried, were evidently of the opinion that the

facts in this case were not sufficient to bring said case within the terms of the Federal Employers' Liability Act—that is, they were evidently not of the opinion that both petitioner and respondent were engaged in interstate commerce, or in work so closely related to it as to be a part of it, at the time respondent was injured.

The question as to whether or not petitioner and respondent were engaged in interstate commerce at the time of respondent's injuries is, of course, all important so far as this application is concerned. If both parties were engaged in interstate commerce at the time of the injury, and the case governed by the Federal Employers' Liability Act, then, if the court deprived petitioner of an immunity guaranteed to it under said Act, the writ of certiorari applied for herein should be granted.

Regardless of the fact as to whether or not respondent intended to bring his case under the Federal Act, if the facts as developed at the trial showed that both parties were engaged in interstate commerce at the time of the alleged injuries, then said case is governed by the Federal Act and the petitioner is entitled to have said case tried by the law announced in said Act, and the

rule established by the Federal Courts regarding cases coming within the terms of said Act.

Mondou v. *N. Y. N. H. & H. R. Co.* (2d Employers' Liability Cases), 223 U. S. 1, 56 L. ed. 327.
C., R. I. & P. Ry. Co. v. *John F. Define,* 239 U. S. 52, 60 L. ed. 140.
Erie Railroad Co. v. *People of the State of New York,* 223 U. S. 671, 58 L. ed. 1149.
Seaboard Air Line Ry. Co. v. *Horton,* 223 U. S. 492, 58 L. ed. 1062.

If the Federal Employers' Liability Act, and the law announced by this Honorable Court relative thereto, governed this case, and the trial court refused to apply principles of law established by this Court relative to cases coming within the terms of said Act, and petitioner was deprived of an immunity guaranteed to it under the terms of said Act by the action of said court, and the Supreme Court of the State of Oklahoma refused to correct such error, then we take it that this Court will issue its writ of certiorari, review the record and correct said errors.

Boldt v. *Pa. R. R. Co.*, 245 U. S. 441, 62 L. ed. 365.
New Orleans & Northeastern R. R. Co. v. *Scarlet*, 249 U. S. 528, 63 L. ed. 752.
Edward Pryor v. *Williams*, 254 U. S. 43, 65 L. ed. 120.

The first question then to consider is, were both petitioner and respondent engaged in interstate commerce at the time of respondent's alleged injuries, and is this case controlled by the Federal Employers' Liability Act?

The testimony contained in the record shows that the engine on which respondent was at work at the time of his injury made regular trips from Tulsa, Oklahoma, to Enid, Oklahoma, and return. It is abundantly shown that the repairs were of such a character that it was not necessary to take said engine out of service (rec., p. 34). The engine arrived at Tulsa on its regular trip from Enid, Oklahoma, at 5:40 on the afternoon of September 2nd. In the early morning of September 3rd the fire had not been drawn from this engine. As expressed by some of the witnesses, it was still hot. It was chalked on the blackboard for certain minor repairs to be finished before it should leave on its regular return trip at 1:50 a. m. on September 3rd. The repairs were made and it did leave on its regular return trip on that day. The evidence further conclusively shows that the trip which this engine regularly made from Tulsa to Enid and return was a connecting link in a channel of com-

merce between St. Louis, Missouri, and points east and Enid, Oklahoma, and points west; that passengers, express and United States mail were carried by other trains to Tulsa, Oklahoma, and picked up by this engine, and carried to Enid, Oklahoma, and there picked up by other engines and carried to points west in Oklahoma, Texas and California (rec. 75 and 77). It is conclusively shown by the testimony that on the day prior to the accident, the last trip the engine made before the accident, it carried at least four interstate passengers from Enid, Oklahoma, to Tulsa, Oklahoma; two of these passengers were bound for Springfield, Missouri, and two for St. Louis, Missouri (Rec., pp. 74-75). It evidently carried mail for points outside the State of Oklahoma to the east, and express for points outside the State of Oklahoma. It is conclusively shown by the testimony that on September 3rd, on its regular trip next after the accident occurred, this train carried passengers from points outside the State of Oklahoma to Enid and points west; that it carried United States mail from points outside the State of Oklahoma to Enid, and that it carried numerous packages of express, some from Wichita, Kansas, and many

from New York City, New York, to parties living at Enid, Oklahoma (rec. pp. 99-101). The testimony shows that the trains pulled by this engine were constantly carrying interstate commerce, and were used by the petitioner as a connecting link in a line of transportation moving passengers, express and United States mail from St. Louis and points east to Enid, Oklahoma, and points west (rec. pp. 75 and 77).

We take it that the above testimony conclusively establishes the interstate nature of this engine.

In *New York Central & Hudson River R. R. Co.* v. *Carr*, 238 U. S. 260, 59 L. ed. 1298, this Honorable Court said:

> "A brakeman on a 'pick-up' freight train running between points in the same state, but containing some cars loaded with interstate freight, who was injured while attempting, in the course of his employment, to set the brake on an intrastate car which had been cut out of the train and backed into a siding, was employed in interstate commerce, within the meaning of the Federal Employers' Liability Act of April 22, 1908, where the setting of such brake was necessary in order that the engine to which the car was attached might, when uncoupled, return to the train and proceed on its journey."

It cannot be said that the engine in question had ceased to partake of the character of commerce in which it was constantly engaged; there was no such withdrawal from service that would change the relation of the engine to the character of work being constantly performed by it. It was not withdrawn from the service—it was as much engaged in the service while it was being repaired to return on its regular trip as if no repairs had been necessary. This engine was set apart for a certain duty, and had been performing certain duties for a long period of time. No interruption was had in the relation of this engine to its duties at the time the accident occurred.

In *Industrial Accident Commission* v. *James C. Davis*, 259 U. S. 182, 66 L. ed. 888, this Honorble Court, in our opinion, clearly defines what must occur before an engine which is constantly used in interstate commerce can be said to have lost its character as an interstate commerce engine, as follows:

> "In some, the tracks, bridges and roadbed and equipment in actual use may be said to have definite character, and give it to those employed upon them. But equipment out of use, withdrawn for repairs, may or may not

> partake of that character, according to circumstances; and among the circumstances is the time taken for repairs,—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a side track or in a roundhouse—the interruption of actual use, and the return to it, being of varying lengths of time; or there may be a removal to the repair and construction shops, a definite withdrawal from service and placement in new relations,—the relations of a workshop,—its employments and employes having cause in the movements that constitute commerce, but not being immediate to it."

In the case under consideration there was only a placement on a side track. This placement occurred so that there was no interruption of the actual use mentioned by this Honorable Court in *Industrial Commission* v. *Davis, supra.* In the above case this Honorable Court intimates that there might be an interruption of actual use for a short length of time and yet the engine not lose its relation to commerce, and still retain its character secured by such relation. However, in this case, no time was lost. The minor repairs performed were performed by "hot work," a term used by railway employes to designate work while the engine is yet hot, and work that will not interrupt the customary runs of the engine.

In *Pederson* v. *Delaware, Lackawanna & Western R. Co.*, 229 U. S. 146, 57 L. ed. 1125, this Honorable Court had under consideration the question whether or not an employe, carrying a sack of bolts to be used in repairing a bridge which was regularly used in both intrastate and interstate commerce, was employed in interstate commerce within the meaning of the Act. In speaking of the relation of a bridge worker to interstate commerce as compared with those working upon engines and cars, it was said:

> "That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the intertate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce de-

pends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged * * * Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

If the engine in question was being used constantly to pull interstate commerce from Tulsa, Oklahoma, to Enid, Oklahoma, and return, thus forming a link in a chain of transportation of in-

terstate commerce; if it was actually used on its last trip in interstate commerce; if it was actually used on its next trip in interstate commerce, then we think it must be said that the engine, itself, when in actual use was engaged in interstate commerce or work so closely related to it as to be a part of it. Then, as was stated by this Honorable Court in the Pederson case, *supra,* the detail work necessary to the keeping of this engine in condition so that it could perform its interstate work, would be just as much a part of the work of interstate commerce as the work performed by the engine while it was actually on the road.

The same principles have been announced by this Honorable Court in

Kinzel v. *C. M. & St. P. Ry. Co.*, 250 U. S. 130, 63 L. ed. 893.

Shanks v. *Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. ed. 436.

Second Employers' Liability cases (*Walsh* v. *New York, N. Y. & H. R. Co.*), 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N. S.) 44.

Norfolk & Western Ry. Co. v. *Earnest*, 229 U. S. 114, 57 L. ed. 1096, 33 Sup. Ct. Rep. 654, Ann. Cas. 1914C 172.

St. Louis-San Francisco Ry. Co. v. *Seale*, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann Cas. 1914C 156.

North Carolina R. Co. v. *Zachary*, 232 U. S. 248, 58 L. ed. 591, 34 Sup. Ct. 305, Ann. Cas. 1914C 159.

This case is readily distinguishable from *Minn. & St. L. R. R. Co.* v. *Winters*, 242 U. S. 353, 61 L. ed. 358. In the Win' s case this Court stated that the agreed statement of facts consisted of only a few words. It was agreed that the engine had been used in the hauling of freight trains over defendant's line, which freight trains hauled both intrastate and interstate commerce, and it was so used after plaintiff's injury. The last time before the injury on which the engine was used was on October 18th, when it pulled a freight train into Marshalltown, and it was used on October 21st, after the accident, to pull a freight train out of the same place. This Court stated that the mere fact it had been used on October 18th to pull a freight train into Marshalltown, and was used three days later, and after the accident occurred, to pull a freight train out of said place, was not sufficient to show that the engine was devoted to interstate commerce. There seemed to be no certainty when

the engine was taken out of service on October 18 that it would be put back in interstate service, or in any service at all. It so happened that three days after it was taken out of service it pulled an interstate freight train out of Marshalltown. The court stated that the engine was not interrupted in an interstate haul to be repaired and go on. It had simply finished some interstate business and had not yet begun on any other. Its next work might have been interstate or confined to the state of Iowa, as it should happen. At the moment of the accident it was not engaged in any commerce.

In the case under consideration, the engine was permanently devoted to fulfilling a link in a chain of interstate commerce transportation. The evidence shows that it had been devoted to this work for a long time. At the time of the accident it was doing this work and no other. Its regular business was to haul a pick-up train constantly engaged in interstate commerce. The fact is not important in this case that the engine itself was confined at all times to points within the State of Oklahoma if it was constantly used in hauling interstate commerce from Tulsa, Oklahoma, to Enid, Oklahoma, and *vice versa*. It was as much engaged

in interstate commerce as if the trips it made extended out of the State of Oklahoma.

The character of the commerce being hauled is the test, rather than the route over which the engine travels in making the haul.

> Roberts on Injuries to Interstate Employes on Railroads, p. 135, Sec. 65.
> *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935.

The Oklahoma Supreme Court stated in its opinion that it could not ascertain from an examination of the record whether or not the trial court was of the opinion that the Federal Employers' Liability Act governed this case. However, the Supreme Court held that said Act did not govern the case. We do not think it is a matter of great importance whether the trial court thought the Federal Act applied, or thought that it did not apply. In this case the petitioner plead as a part of its answer that the case was governed by said Act. If the facts were sufficient to show, as we think they were, that said Act does apply to this case, and the court by its instruction to the jury deprived petitioner of an immunity guaranteed to it by said

Act, or by the principles established by this Honorable Court applicable to said Act, then the petitioner is entitled to redress at the hands of this Honorable Court.

II.

In giving to the jury paragraph No. 13 of the court's instructions to the jury, the trial court deprived petitioner of its right guaranteed under the Federal Employers' Liability Act, to have the jury instructed and respondent required to prove that the defect, if one existed, in the instrumentality furnished the employe, must have occurred or have been permitted to exist by reason of some negligence on the part of the company, its officers or employes, before recovery could be had on that account, and the Supreme Court of the State of Oklahoma erred in holding that the trial court had correctly instructed the jury regarding the alleged negligence of the company and the duties which said company owed respondent.

Paragraph 13 of the trial court's instructions to the jury reads as follows:

> "You are further instructed that if you find from a fair preponderance of the evidence that while the plaintiff was working in the general scope of his employment and in the exercise of ordinary care and caution while using a defective prosser pin, not knowing that the same was defective, and the same not being discoverable by the use of ordinary care on the part of the plaintiff furnished to him by the defendant

herein, a piece of metal chipped or came off of said defective prosser pin while being used in the proper and ordinary way, striking the plaintiff in the left eye, thereby totally destroying the sight of the same, the plaintiff at all times acting within the general scope of his employment, and exercising ordinary care, then and in that event the plaintiff will be entitled to recover in such amount as by the evidence will compensate him, however, not to exceed fifty thousand dollars" (rec. p. 118).

Assuming that the Federal Employers' Liability Act governs this case, the above instruction deprived petitioner of the right to require that respondent prove his injuries occurred by reason of some negligence on petitioner's part before he could recover. By the above instruction the court undertakes to tell the jury in the concrete just what facts are necessary for them to find in order to find for the plaintiff. The court tells the jury if they do find the facts set forth in said instruction, then it is their duty to find for the plaintiff. The jury may have found all the facts set forth in the above instruction and then may not have found that petitioner was guilty of negligence. By above instruction the court tells the jury that if they find that respondent was using a defective prosser pin, not knowing that it was defective, said defect not

being discoverable by an ordinary inspection, the pin being furnished by petitioner, and respondent was injured while in line of duty, and while exercising ordinary care, by a sliver flying from said pin and striking respondent in the eye, then they should find against petitioner and in favor of respondent. This instruction was in direct conflict with the Federal Act which limits the employe's right of recovery to injuries caused by the negligence of the employer.

This court has had before it, we think, this identical proposition. It was the contention of plaintiff in *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 58 L. ed. 1062, that liability existed for injury to an engineer by reason of the failure of the railway company to furnish a guard which was claimed was necessary for the safe use of the steam gauge on the engine. In that case the court instructed the jury as follows:

> "If you find from the evidence that it (the locomotive engine) was turned over to him without the guard, and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge, and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in

that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue 'yes.' "

Mr. Justice Pitney, in criticising this instruction, speaking for this court said:

"In these instructions the trial judge evidently adopted the same measure of responsibility respecting the character and safe condition of the place of work, and the appliances for doing of the work, that is prescribed by the local statute. But it is settled that since Congress, by the act of 1908, took possession of the field of the employers' liability to employes in interstate transportation by rail, all state laws upon the subject are superseded. Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*, 223 U. S. 1, 55, 56 L. ed. 327, 348).

"The act is quoted in full in that case at p. 6. By its first section a right of action is conferred (under conditions specified) for injury or death of the employes resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed. * * *

"This clause has two branches; the one covering the negligence of any of the officers, agents or employes of the carrier, which has the effect of abolishing in this class of cases the

common law rule that exempted the employer from responsibility for the negligence of a fellow employe of the plaintiff; and the other relating to defects and insufficiencies in the cars engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon the negligence only, and to exclude responsibility of the carrier to its employes for defects and insufficiencies not attributable to negligence. The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employes is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. * * * *To hold that under the statute the railroad company is liable for the injury or death of an employe resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence;* and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated. The instructions above quoted imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In effect, the jury was instructed that the absence of the guard glass was con-

clusive evidence of defendant's negligence. In this there was error" (italics ours).

By instruction No. 13, above quoted, the jury were emphatically instructed that the defect in the pin rendered the company liable, regardless of how the defect came about. They were told that the company was liable for the injury of an employe resulting from a defect or insufficiency in its appliances, however caused. They were told the very thing that this Honorable Court has said took away from the Act the words, "due to its negligence". The instruction imposed upon the employer an absolute responsibility for the safe condition of the appliances of the work, instead of limiting the responsibility to the exercise of reasonable care. In short, the court instructed the jury just what this Honorable Court said in the Horton case, *supra*, the court should not instruct the jury.

Under instruction No. 13 the company may have purchased the tool from a responsible and reliable firm; the defect may have been caused by a mistake in the temper when the tool was made; the defect may have been such as to make it impossible for the railway company to discover it by any inspection which it was its duty to conduct; the com-

pany may have fulfilled its entire duty in conducting inspections yet the jury had no alternative but to return a verdict for the respondent. There was evidence tending to support all of the above enumerated defenses, but the jury were not at liberty to consider any of them if they followed the admonition contained in instruction No. 13.

At page 70 of the record filed with this Honorable Court, respondent testified that the defect existed in the pin by reason of the pin being improperly tempered at the time it was made, and that one could not determine its defective condition by looking at it. Then, if this is true, the defect was latent and not discoverable by an inspection which it was the duty of the company to make, yet by the above instruction the jury are told to find for the plaintiff regardless of the latentness of the defect, and regardless of the fact as to whether or not the defect was discoverable by any inspection which came within the duties of petitioner.

A suit in a state court under the Federal Employers' Liability Act is governed by the rule of the Federal courts that the negligence of the defendant is an affirmative fact which plaintiff must establish.

New Orleans & Northeastern R. R. Co. & U. S. F. & G. Co. v. *Harris, Admr.*, 247 U. S. 367, 62 L. ed. 1167.

Nitroglycerine Case (*Parrott* v. *Wells*), 15 Wall. 524, 537, 21 L. ed. 206, 211.

Patton v. *Texas & P. R. Co.*, 179 U. S. 658, 663, 45 L. ed. 361, 364, 21 Sup. Ct. Rep. 275.

Seaboard Air Line R. Co. v. *Horton*, 233 U. S. 492, 501, 502, 58 L. ed. 1062, 1068, 1069.

Boldt v. *Pa. R. R. Co.*, 245 U. S. 441, 62 L. ed. 385.

Marian J. Looney v. *Metropolitan R. R. Co.*, 200 U. S. 480, 50 L. ed. 564.

Texas P. R. Co. v. *Barrett*, 166 U. S. 617, 41 L. ed. 1136.

In the case under consideration the railway company was not an insurer of the safety of its prosser pins, but was required to exercise only ordinary care to keep such pins in good repair, and if it used ordinary care it was not liable for an injury resulting to the respondent from a defect therein not discoverable by such ordinary care. The question of ordinary care was for the jury to pass upon under the evidence in the case, but by the above instruction, the court eliminated this question and told the jury that if the pin was defective, regardless of whether or not the company knew it, or could have known it by an inspection, and re-

spondent was injured while using it, then the company was liable.

As has been said above, the evidence in this case tended to show that the defect in the pin, if one existed, was latent—that is, it consisted of an improper temper of the metal composing the pin. If the defect was latent so that an inspection which was the duty of the company to make, would not discover it, then the company would not be responsible for the defect. This principle has been thoroughly established by this Court, as well as a majority of the state courts of this country.

Atlantic, etc., R. Co. v. *Reynolds*, 117 Ga. 47, 43 S. E. 456.

Smith v. *New York Cent. & H. R. R. Co.*, 58 N. E. 655.

Thompson on Negligence, p. 1053.

Martin v. *Highland Park Mfg. Co.*, 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671.

28 Cyc., page 1145.

Moran v. *General Fire Extinguisher Co.*, 259 Pac. 168, 102 Atl. 501.

Export Cooperage Co. v. *Ramsey* (Ark.), 202 S. W. 468.

South v. *Seattle, P. A. & W. Ry. Co.*, 168 Pac. 896.

Skidmore v. *West Virginia & P. R. Co.*, 41 W. Va. 293, 23 S. W. 713.

Noyes v. *Smith*, 28 Vermont 59, 65 Am. Dec. 222.

Galveston M. & S. A. Ry. Co. v. *Buch* (Tex.), 65 S. W. 681.
Alexander v. *Pa. Water Co.* (Pa.), 50 Atl. 991.
Nutt v. *South. Pac. Ry. Co.* (Oregon), 35 Pac. 653.
Mulligan v. *Crimmins*, 75 Hun. 587, 27 N. Y. Sup. 819.
Roughan v. *Boston & Lockhart Block Co.* (Mass.), 36 N. E. 461.
Louisville & N. R. Co. v. *Hinder* (Ky), 30 S. W. 399.

It is true that the court instructed the jury in this case that negligence must be shown on the part of the railway company proximately causing respondent's injuries, before he would be entitled to recover. However, in view of the fact that the court told the jury that if they believed the things stated in instruction No. 13 existed, then they should find for the respondent, this was equal to telling them that the things stated in instruction No. 13 constituted negligence on the part of the company which proximately caused respondent's injuries. After the giving of instruction No. 13, petitioner was not aided in the least by an instruction to the effect that negligence must exist before recovery could be had.

In view of the fact that the things set forth

in instruction No. 13, which, if existed, definitely fixed petitioner's liability, were not contradicted, then it must be presumed that the jury found against petitioner by reason of this direct admonition relative to undisputed facts, and did not find against the petitioner on account of some other theory about which the facts were in dispute. Then the only allegation of negligence now left in this case, other than the latent defect in the pin, is the failure on the part of the company to furnish respondent an electric light instead of a kerosene torch. There is not one scintilla of proof in the record that the use of the kerosene torch, instead of the light, in any manner caused or contributed to the cause of the accident. Respondent testified that the pin slivered because it was improperly tempered. No one testified anything tending to show that the pin slivered, or the respondent was struck by the sliver on account of insufficient light.

In *Kansas City & P. R. Company* v. *Ryan*, 52 Kan. 637, 35 Pac. 292, it was said:

> "If the company purchased the jack of a well known and reliable house, with an established reputation as a dealer in railroad tools and supplies, and the defect was latent or concealed, so that no one but a mechanic or a

skilled worker in iron could have discovered it by careful examination, the railroad company would not be guilty of negligence, in furnishing the jack for use to its employes."

Petitioner's requested instruction No. 3 was almost identical with the above excerpt, yet the trial court refused to give said instruction, but in stead gave instruction No. 13 above quoted. Petitioner's requested instruction No. 3 reads as follows:

"You are instructed that the evidence in this case discloses that the tools which were being used by the plaintiff and his co-laborers, in repairing the engine at the time the injuries were received by the plaintiff, were purchased by the defendant from an independent company, and you are instructed in this respect that the degree of care which the law imposes upon the defendant in this connection is that its tools be purchased from a reputable and known establishment engaged in the business of manufacture and sale of said tools, and the defendant was entitled to rely upon said tools being reasonably safe and reasonably fitted to perform the work for which they were manufactured and sold, and unless the defect in the tool which resulted in the injury to the plaintiff was obvious and apparent, or could be discovered by an inspection, then you are instructed that the defendant has discharged its duty in this respect to the plaintiff and could not be liable for latent defects in said tools, and the plaintiff herein assumed the risk of such injuries as are in-

cident to and arise from the use of said tools in the business in which he was engaged" (rec. p. 110).

The evidence in this case conclusively showed that the prosser pin in question was purchased from an independent and reliable establishment of good reputation; a company which had, for many years, furnished such tools to all of the big railroad companies of the country. When the railway company purchased the pin in question from this company of good standing and reputation, they had a right to presume in the absence of any defect which was discoverable by the use of ordinary care, that the tool was safe to furnish its employes, and were not negligent in failing to put the tool to some test, if such test is possible, which would determine the exact nature of the metal composing the interior of said pin.

It will be seen that the court's entire instructions to the jury bore out the idea expressed by instruction No. 13, *supra*. By instruction 3a the court told the jury "before the plaintiff is entitled to recover in this case he must prove (subdivision 2) that the defendant had failed to provide him with reasonably safe tools and appliances with which to do his work" (rec. p. 115). By instruc-

tion No. 4 the court told the jury, "a duty is indicated and measured by the exigencies of the occasion as they appear from the surrounding facts and circumstances at the time" (rec. p. 115). By instructioin No. 10 the court told the jury, "you are instructed that it is the duty of the employer to * * * see that same (appliances and tools) are kept in proper repair * * * an. the employe * * * is under no obligation to inspect the tools and appliances for latent defects." Then followed instruction No. 13 as above quoted, which, in effect, directed the jury to return a verdict for the defendant regardless of negligence. Petitioner may have failed in all particulars stated in these instructions to do the things mentioned therein, but such failure may not have resulted in negligence or carelessness. Petitioner may have failed to provide reasonably safe tools and appliances, but may not have been negiigent in that respect.

We submit that the giving of instruction No. 13, and other instructions above referred to, deprived this petitioner of an immunity guaranteed to it under the Federal Act. It deprived the petitioner of the right to have the jury instructed that respondent must prove some negligence upon

the part of petitioner proximately causing his injury, in the absence of which evidence respondent could not recover. It enabled respondent to recover from petitioner by the mere fact of establishing a defect in the pin and his injury, regardless of the fact as to whether or not the defect was caused by petitioner's negligence. (For more extended argument and authorities in support of this proposition, we respectfully call this Honorable Court's attention to the argument contained in our petition for rehearing filed with the Oklahoma Supreme Court shown at pages 137 to 174 of the record.)

III.

The trial court in giving to the jury paragraph No. 11 of the court's instructions to the jury, deprived petitioner of the right guaranteed it under the Federal Employers' Liability Act to have the jury consider petitioner's defense of assumed risk, if the risks were created by petitioner's negligence.

At the request of respondent, and over the objection and exceptions of petitioner, the court, by paragraph No. 11 of his charge, instructed the jury regarding the question of assumption of risk, as follows:

"You are instructed that the plaintiff herein

in accepting the employment as boiler maker for the defendant, assumed all of the ordinary and usual risks and perils incident to such employment, whether they were dangerous or otherwise, and all of the risks he had knowledge of or may by the exercise of reasonable care have known to exist, unless there was some agreement or understanding to the contrary. *The plaintiff did not, however, assume such risks as were created by the defendant's negligence, if any be shown*, nor such as were latent or were only discovered at the time of the injury complained of by the plaintiff herein" (italics ours) (rec. p. 117).

In *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 58 L. ed. 1062, the trial court had instructed the jury as follows:

> "He (the employe) does not assume the risk incident to the negligence of his employer in providing machinery and appliances with which he has to work."

This Honorable Court, speaking through Mr. Justice Pitney, said:

> "When the employe does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employe assumes the risk, even though it arise out of the master's breach of duty."

The above instruction was harmful in this case for this reason:

Suppose the jury found that the defect in the pin existed, and conceding, for the moment, that there was sufficient evidence before them from which they might have found that it existed by reason of the negligence of the railway company, yet found that owing to the fact that respondent had been an experienced railway man for fifteen or eighteen years, and for many years had been constantly at work with such pin, should have known of the danger of the pin slivering, or was in as favorable a position as the company to have ascertained it, then, under the true rule, as set forth in the Horton case, *supra,* they must have found that he assumed the risk, but by the above instruction, which told the jury that in no event would he assume a risk created by the negligence of the master, the petitioner was deprived of having them pass upon this question.

In *C., R. I. & P. Ry. Co.* v. *Ward,* 252 U. S. 18, 64 L. ed. 430, this Honorable Court had before it an identical instruction with the instruction above quoted and given by the trial court in this case. That case was on writ of certiorari to the Supreme

Court of Oklahoma. The trial court had given the following instruction:

> "You are further instructed that while a servant does not assume the extraordinary and unusual risks of the employment, yet on accepting employment he does assume all the ordinary and usual risks and perils incident thereto, whether it be dangerous or otherwise, and also all risks which he knows or should, in the exercise of reasonable care, know to exist. *He does not, however, assume such risks as are created by the master's negligence,* nor such as are latent or are only discoverable at the time of the injury" (italics ours).

It will be seen that the above instruction is almost word for word with the instruction given by the trial court in this case. This Honorable Court, speaking through Mr. Justice Day said:

> "Treating the case, as the court below did, as one in which the injury occurred while the petitioners and respondent were engaged in interstate commerce, this charge as to the assumption of risk was not accurate, in stating without qualification that the servant did not assume the risk created by the master's negligence. We have had occasion to deal with the matter of assumption of risk in cases where the defense is applicable under the Federal Employers' Liability Act, being those in which the injury was caused otherwise than by the vi lation of some statute enacted to promote the safety of employes. As this case was

not one of the latter class, assumption of risk was a defense to which the defendants below were entitled. *Seaboard Ail Line R. Co.* v. *Horton,* 233 U. S. 492, 58 L. ed. 1062, L. R. A. 1915C 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B 475, 8 U. S. (C. C. A.) 834; *Jacobs* v. *Southern R. Co.,* 241 U. S. 229, 60 L. ed. 970, 36 Sup. Ct. Rep. 588."

The above instruction deprived petitioner of its right to have the jury consider its defense of assumption of risk if they believed that the defect in the pin was caused or permitted to exist by reason of the negligence on the part of petitioner. (For more extended argument and authorities in support of this proposition, we respectfully call the Court's attention to our second petition for rehearing filed with the Oklahoma Supreme Court by express permission of said Court, shown at pages 184 to 203 of the record.)

CONCLUSION.

We have shown in this brief that this case was governed exclusively by the Federal Act known as the Federal Employers' Liability Act; that under the terms of that Act and ruling of this Honorable Court with reference thereto, it is absolutely essential that an employe show he has been injured by some negligence on the part of his master before

he can recover for injuries received in the course of his employment. Yet the trial court deprived petitioner of this right by instructing the jury that if respondent was injured while in the course of his employment using a defective pin, he could recover regardless of whether the defect was caused or permtted to exist by negligence of the company or not. The trial court, in effect, made the company an insurer of the safety of its appliances furnished its employes. This position, we contend, deprived us of a substantial right guaranteed to us under the Federal Act.

Petitioner requested the court to instruct the jury, in effect, that if the evidence showed that the tool in question was purchased from an independent and reliable establishment engaged in the manufacture of such tools, and the defect which resulted in plaintiff's injury was not obvious and apparent and could not be discovered by an inspection, then the company was not negligent in furnishing said tool to its employe, and would not be liable for latent defects. The court, in refusing to give to the jury this instruction, deprived petitioner of one of its principal defenses, and a defense to which it was entitled under the Federal Employ-

ers' Liability Act, and took away a substantial guaranty under said Act.

The trial court instructed the jury in plain terms that the respondent did not assume any risk created by a condition, the existence of which was negligence on the part of the company, even though the respondent knew, or by the exercise of ordinary care, could have known of the existence of the dangers so created by the master's negligence. This instruction, under the ruling of this Honorable Court, was error, and in this case deprived petitioner of the consideration of the jury, to which it was entitled.

In view of the above, we sincerely submit that the writ of certiorari should issue, this case be reviewed by this Honorable Court, and the manifest errors pointed out herein, be corrected.

Respectfully submitted,

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had moved over the line at the same time as the impedimenta—*Held* that acceptance of the amount allowed, without protest or appeal to the Comptroller of the Treasury, was not acquiescence on the part of the railroad and did not bar it from suing for the balance in the Court of Claims. P. 172.

3. No action of the accounting officials can bar the right of a claimant to have the Court of Claims determine whether he is entitled to recover under a contract with the Government. P. 174.
4. To constitute acquiescence in payment by the Government of a smaller sum than is due, something more must be shown than acceptance of the smaller sum without protest; there must have been some conduct of the creditor akin to abandonment or waiver, or from which an estoppel might arise. P. 175.
5. The provision of the Dockery Act, July 31, 1894, c. 174, §§ 7, 8, 28 Stat. 162, 206, 207, making acceptance of payment under the auditor's settlement, without appeal to the Comptroller, conclusive, does not prevent proceedings in the Court of Claims. Pp. 173, 177.

59 Ct. Cls. 82, affirmed in part, reversed in part.

APPEAL from a judgment of the Court of Claims disallowing three claims for transportation furnished the War Department.

Mr. Lawrence H. Cake, with whom *Mr. Alex. Britton* was on the brief, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom the *Solicitor General* was on the brief, for the United States.

The acceptance of the payment of the unliquidated account without protest or other manifestation of intention to make further claim forecloses the right of the appellant to maintain the suit. "Dockery Act," July 31, 1894, 28 Stat. 206; *Fleckner* v. *United States*, 8 Wheat. 338; *Oregon-Washington R. R.* v. *United States*, 255 U. S. 339; *Louisville & Nashville* v. *United States*, 267 U. S. 395; *Stewart* v. *Barnes*, 153 U. S. 456; *De Arnaud* v. *United States*, 151 U. S. 483; *Chicago, M. & St. P. Ry.* v. *Clark*, 178 U. S. 353; *Baird* v. *United States*, 96 U. S. 430; *Merrit* v. *Cameron*, 137 U. S. 542; *Hennessy* v.

Bacon, 137 U. S. 78. See also *French v. Shoemaker*, 14 Wall. 314, 333, 334; *De Wolf* v. *Hays*, 125 U. S. 614; *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196; *United States* v. *Cousinery*, 25 Fed. Cas. 677; *Savage* v. *United States*, 92 U. S. 382; *Savage Arms Corp.* v. *United States*, 266 U. S. 217; *United States* v. *Cramp*, 206 U. S. 118. *St. Louis, Kennett & S. E. R. R.* v. *United States*, 267 U. S. 346; *Cairo, Truman & Sou. R. R.* v. *United States*, 267 U. S. 350.

The inclusion of the items in the former petition on which judgment was stipulated and paid without reservation forecloses the right of the appellant to maintain the suit. *Vaughn* v. *United States*, 34 Ct. Cls. 342; *United States* v. *Frerichs*, 124 U. S. 315.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is an appeal by the St. Louis, Brownsville & Mexico Railway from a judgment of the Court of Claims which disallowed three claims for transportation furnished to the War Department. 59. Ct. Cl. 82. That the claims were originally valid is conceded. The defense as to each is that recovery has been barred by discharge. As to two of the claims, by § 178 of the Judicial Code. As to the third, by the rule declared in *Oregon-Washington R. R. & Navigation Co.* v. *United States*, 255 U. S. 339. Whether on the facts found the statute and the rule apply, are the questions for decision.

First. The two claims (numbered 3055 and 4732) were for services rendered in 1917. They had been included with many others in a petition filed in the Court of Claims by the Railway in 1920. On that petition a judgment had been entered for $22,624.78 and duly paid before this suit was begun. The Judicial Code provides in § 178: "The payment of the amount due by any judgment of the Court of Claims . . shall be a full dis-

charge to the United States of all claim and demand touching any of the matters involved in the controversy." The Railway contends that these two claims were not "matters involved in the controversy" on which the earlier judgment was entered. To establish that contention it must rely wholly upon the following finding made in this case: "One of the findings of fact in said [the earlier] case stated that 'the numbers and amounts referred to in the foregoing paragraphs constitute the component parts and sum total of the said $22,624.78 and are the only items in question in the case at bar.' Bills No. 3055 and No. 4732 are not mentioned in the findings in that case. The report of the Treasury Department filed in said case and upon which said stipulation of facts was based stated as to bills No. 3055 and No. 4732 that because no deduction had been made from these bills 'on account of the cause of complaint set forth in the petition nothing is due in recovery.'"

The finding thus relied upon by the Railway does not show that these two claims were not among "the matters involved in the controversy" in the earlier case. On the contrary, it shows that they were there in controversy. And it suggests that the Railway, after the introduction of the report of the Treasury Department, acquiesced in the latter's conclusion that as to these two claims "nothing is due." Compare *United States* v. *Frerichs*, 124 U. S. 315, 320; *Michot* v. *United States*, 31 Ct. Cls. 299; *Vaughn* v. *United States*, 34 Ct. Cls. 342. The case is unlike *Spicer* v. *United States*, 5 Ct. Cls. 34; *Book* v. *United States*, 31 Ct. Cls. 272; and *Adams* v. *United States*, 33 Ct. Cls. 411. As to these two claims the judgment of the lower court is affirmed.

Second. The remaining claim is for the disallowed part of a claim for $2,549.08 which was "settled by the Auditor for the War Department May 10, 1920" by making certain deductions, thus allowing a smaller sum. It has

never been involved in any litigation. The whole claim presented to the Auditor was on a single government bill of lading for transporting, in 1916, so-called Army impedimenta; that is, guns, ammunition, caissons, tents and miscellaneous military equipment belonging to the United States. That the whole of the service covered by the bill was actually rendered was never questioned. Nor was there any dispute either as to quantity or weight, or as to the tariff rate under which such articles ordinarily move. Thus, the claim presented to the Auditor was definite in amount. The deduction made by him was somewhat in the nature of a counterclaim. The Comptroller of the Treasury ruled in 1918 that, for the transportation of military impedimenta, the Government was entitled to the benefit of a provision in a passenger tariff by which, when persons travel in a party, there is allowed for every twenty-five passenger fares one baggage car free for personal effects. The Auditor apparently found that, at the same time these impedimenta moved, at least twenty-five soldiers had moved over the line. He therefore deducted a corresponding amount from this independent bill for freight. In suits brought by other companies the Court of Claims held that the Comptroller's ruling was wrong. See *Missouri Pacific R. R. Co.* v. *United States,* 56 Ct. Cls. 341. Thereupon, this suit was brought in August, 1922, to recover the amount wrongly deducted. The lower court held that the Railway was barred from recovery because it had accepted, without protest or appeal, the reduced amount which the Auditor allowed.

There is no statute or departmental rule which, as in *Nichols* v. *United States,* 7 Wall. 122, makes such protest or appeal a condition precedent to the existence of the cause of action or to plaintiff's right to resort to the Court of Claims. In respect to furnishing transportation, a railroad ordinarily bears to the Government the same relation that it does to a private person using its facilities. It may

exact payment either in advance or upon the completion of the service rendered. It may, as a matter of accomodation or convenience, give a reasonable credit. Payment for transportation, as for other service or supplies, may ordinarily be secured by presenting the claim to the appropriate disbursing officer of the department served. Because of limitations imposed upon the powers of disbursing officers, it is often desirable to present the claim for direct settlement to the Auditor for the department, who is an accounting officer of the Treasury. The Auditor may allow the claim in whole or in part. If his action is not satisfactory, either to the claimant or to the head of the department affected, an appeal may be taken to the Comptroller of the Treasury for its revision. In the absence of an appeal, the settlement of the auditor is "final and conclusive upon the Executive Branch of the Government." In case of such appeal the decision of the Comptroller is conclusive. Any person accepting payment under a settlement by the Auditor is precluded from obtaining such revision of the settlement as to any item upon which payment is accepted. Dockery Act, July 31, 1894, c. 174, §§ 7, 8, 28 Stat. 162, 206, 207.

No action of these officials can bar the right of a claimant to have the Court of Claims determine whether he is entitled to recover under a contract with the Government. *Oregon-Washington R. R. & Navigation Co.* v. *United States,* 54 Ct. Cls. 131, 138, 139. Compare *United States* v. *Harmon,* 147 U. S. 268; *United States* v. *Babcock,* 250 U. S. 328. The right to invoke the legal remedy may be lost by the claimant's failure to invoke it within the statutory period of limitations. But the substantive right to recover an amount confessedly due can be lost only through some act or omission on the part of the claimant which, under the rules of the common law as applied by this Court to claims against the Government, discharges the cause of action. Acquiescence by the claim-

ant in the payment by the Government of a smaller amount than is due will ordinarily effect the discharge. Acquiescence can be established by showing conduct before the payment which might have led the Government to believe that the amount allowed was all that was claimed, or that such amount, if paid, would be received in full satisfaction of the claim. Acquiescence can, also, be established by showing conduct after the payment which might have led the Government to believe that the amount actually received was accepted in full satisfaction of the original claim. But to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must have been some conduct on the part of the creditor akin to abandonment or waiver or from which an estoppel might arise. Every case in which this Court has sustained the affirmative defense of acquiescence rests upon findings which include at least one of these additional features.[1] In the case at bar they are wholly lacking.

The affirmative defense of acquiescence by acceptance of a smaller sum than was actually due—the bar relied upon in this suit—must not be confused with other affirmative defenses which are often interposed to suits in which the plaintiff claims that the Government has

[1] *United States* v. *Shrewsbury*, 23 Wall. 508; *Railroad Company* v. *United States*, 103 U. S. 703; *Pray* v. *United States*, 106 U. S. 594; *Central Pacific R. R. Co.* v. *United States*, 164 U. S. 93, 99, 100; *United States* v. *Garlinger*, 169 U. S. 316; *Oregon-Washington R. R. & Navigation Co.* v. *United States*, 255 U. S. 339, 344, 345, 347–8; *Western Pacific R. R. Co.* v. *United States*, 255 U. S. 349, 353–5; *New York, New Haven & Hartford R. R. Co.* v. *United States* 258 U. S. 32, 34; *Louisville & Nashville R. R. Co.* v. *United States* 258 U. S. 374, 375; *Louisville & Nashville R. R. Co.* v. *United States*, 267 U. S. 395. Compare *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159, 164.

paid him only a part of what was due. Among these are accord and satisfaction or compromise of a disputed claim; [2] voluntary submission of a disputed claim to an investigating board and acceptance of the amount allowed by it; [3] adjustment of damages inherently unliquidated; [4] surrender of the instrument sued on; [5] prior acceptance of the principal of a debt as a bar to a suit for accrued interest; [6] prior judgment on part of an indivisible demand. [7] Cases in which acquiescence by acceptance of a smaller sum is relied upon as an affirmative defense must also be differentiated from those in which acquiescence is proved to show that the claim sued on never arose. Prominent among the cases of this character are those in which a railroad, free to decline, carried the mail after notice from the Postmaster General that payment for future services would be made at a reduced rate.[8] In

United States v. *Justice*, 14 Wall. 535. Compare *Mason* v. *United States*, 17 Wall. 67; *Piatt's Administrator* v. *United States*, 22 Wall. 496. In the following cases there was a receipt in full or a release. *United States* v. *Child & Co.*, 12 Wall. 232; *United States* v. *Clyde*, 13 Wall. 35; *Sweeny* v. *United States*, 17 Wall. 75; *Chouteau* v. *United States*, 95 U. S. 61; *Francis* v. *United States*, 96 U. S. 354; *De Arnaud* v. *United States*, 151 U. S. 483; *St. Louis, Kennett & Southeastern R. R. Co.* v. *United States*, 267 U. S. 346. In *Cairo, Truman & Southern R. R. Co.* v. *United States*, 267 U. S. 350, the release was under seal.

[2] *United States* v. *Adams*, 7 Wall. 463, 479; *United States* v. *Mowry*, 154 U. S. 564; *United States* v. *Morgan*, 154 U. S. 565.

[3] *Baird* v. *United States*, 96 U. S. 430; *Murphy* v. *United States*, 104 U. S. 464.

[4] *Savage* v. *United States*, 92 U. S. 382, 388.

[5] *Stewart v. Barnes*, 153 U. S. 456; *Pacific Railroad* v. *United States*, 158 U. S. 118.

[6] *Baird* v. *United States*, 96 U. S. 430, 432.

[7] *Eastern R. R. Co.* v. *United States*, 129 U. S. 391; *Chicago, Milwaukee & St. Paul Ry.* v. *United States*, 198 U. S. 385; *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 225 U. S. 640, 650; *Delaware, Lackawanna & Western R. R. Co.* v. *United States*, 249 U. S. 385; *New York, New Haven & Hartford R R. Co.* v. *United*

such cases the plaintiff fails, even where it appears that the reduced payment was accepted under protest, because the contract implied in fact on which it seeks to recover cannot be established. Cases involving the affirmative defense of acquiescence by acceptance of a smaller sum than was actually due must likewise be differentiated from those in which one wrongly removed from a statutory office is denied relief unless suit is instituted promptly. The latter rest upon a policy not here applicable.[9] The cases urged upon our attention by counsel for the Government present, in the main, instances of defenses other than acquiescence.

The claim here in question was for an amount fixed by the tariff. A bill for the full sum due was presented to the appropriate officer. The deduction made by the Auditor was without warrant in law. There was no act or omission of the claimant which could conceivably have induced the making of the deduction. Nor did the claimant in any way indicate satisfaction with the reduced amount received by it. The Government did not establish the affirmative defense of acquiescence by showing merely acceptance without protest. To hold that such acceptance barred the right to recover the balance wrongly withheld was to give it an effect in judicial proceedings similar to that which it had within the executive department under the Dockery Act. See *Texas & Pacific Ry. Co. v. United States*, 57 Ct. Cls. 284. For such a rule there is no support either in the legislation of Congress or in the decisions of this Court. Compare *Clyde*

States, 251 U. S. 123, 127; *St. Louis S. W. Ry Co.. v. United States* 262 U. S. 70. Compare *United States v. Bostwick*, 94 U S. 53, 67; *United States v. Martin*, 94 U. S. 400; *Willard, Sutherland & Co. v. United States*, 262 U. S. 489, 498.

[9] *Nicholas v. United States*, 257 U. S. 71, 76; *Norris v. United States*, 257 U. S. 77; *Stager v. United States*, 262 U. S. 728. Compare *Arant v. Lane*, 249 U. S. 367; *Wallace v. United States*, 257 U. S. 541, 547.

v. *United States*, 13 Wall 38. The Railway was entitled to judgment for the amount wrongly deducted by the Auditor.

Affirmed in part.
Reversed in part.

ST. LOUIS, BROWNSVILLE & MEXICO RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 310. Argued March 20, 1925.—Decided April 27, 1925.

1. Claims presented to the Court of Claims but not pressed, in the same proceeding in which others were allowed and paid, *held* barred by Jud. Code, § 178, providing: "The payment of the amount due by any judgment of the Court of Claims . . . shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy." P. 171.
2. In settling a railroad's freight bill for transporting army impedimenta at tariff rates, the auditor for the War Department erroneously made a deduction, by way of counterclaim, upon the ground that part of the transportation was covered, under the railroad's passenger tariff, by the baggage allowance of soldiers who